

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1751

B

United States Court of Appeals

P/S

For the Second Circuit.

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff-Appellant,

-against-

HARTFORD INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From the District Court of the
United States For The Eastern District of New York

JOINT APPENDIX

JOHN L. PIAZZA
350 Fifth Avenue, Suite 6101
New York, N.Y. 10001
Attorney for Plaintiff-Appellant

GREENHILL AND SPEYER
56 Pine Street
New York, N.Y. 10005
Attorneys for the Defendant-Appellee



5

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RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
November 9th, 1972	Petition and bond for removal filed. (from S.C. County of Richmond)
November 14th, 1972	Notice of removal of petition filed.
November 16th, 1972	Answer filed
March 27th, 1974	Notices to amend answer filed.
March 27th, 1974	Before Bartels, J. - Case called - Trial ordered and begun - Stipulations as to various material facts - ex- istence of policy, etc., entered on the record - Trial cont'd. to 3/28/74.
March 28th, 1974	Before Bartels, J. - Case called- Trial resumed - Deft's motion to dismiss for failure to prove a cause of action - denied - Trial concluded - Decision reserved.
April 24th, 1974	By Bartels, J. - Memorandum and order dtd. 4-24-74 granting judgment in favor of deft'. dismissing complaint on merits etc. filed. (p/c mailed to attys)
April 25th, 1974	Judgment dtd 4-25-74 dismissing complaint filed.
May 24th, 1974	Plaintiff's notice of appeal filed.

SUMMONS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

NARROW PROMOTIONS, LTD. d/b/a
ELITE DELI

Plaintiff

SUMMONS WITH NOTICE

-against-

HARTFORD INSURANCE COMPANY,

Defendant

-----X

Index No. _____
Plaintiff designates Richmond County as the place of
trial

The basis of the venue is real property covered by
insurance is located in Richmond County

Plaintiff business address 2100 Richmond Road

County of Richmond

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the
complaint in this action and to serve a copy of your
answer, or, if the complaint is not served with this
summons, to serve a notice of appearance, on the Plaintiff's
Attorney(s) within 20 days after the service of this sum-
mons, exclusive of the day of service (or within 30 days
after the service is complete if this summons is not per-
sonally delivered to you within the State of New York);

SUMMONS

and in case of your failure to appear or answer,
judgment will be taken against you by default for
the relief demanded in the complaint.

Dated, Staten Island, New York
October 16th, 1972

EDMUND J. MURPHY
Attorney(s) for Plaintiff
Office and Post Office Address
93 New Dorp Lane
Staten Island, New York 10306
351-7777

Upon your failure to appear, judgment will be taken against
you by default for the sum of \$ with interest from
19 and the costs of this action.

COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----x
NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff,

Index No.

-against-

VERIFIED COMPLAINT

HARTFORD INSURANCE COMPANY,

Defendant.
-----x

Plaintiff by his attorney, EDMUND J. MURPHY,
ESQ., complaining of the Defendant, respectfully sets
forth to this Court and alleges:

FIRST: The Plaintiff is a corporation
duly organized and existing pursuant to the laws of the
State of New York having its principal office at 2100
Richmond Road, Staten Island, New York.

SECOND: That the Defendant HARTFORD IN-
SURANCE COMPANY is a duly organized fire insurance company
doing business in the State of New York.

THIRD: Heretofore and on or about the
25th day of July, 1970 the Defendant made and issued a
certain policy of insurance numbered 17 SMP 101960, duly
signed by its authorized agent, John L. Piazza, 178 Rose

COMPLAINT

Avenue, Staten Island, in the Borough and County of Richmond, City and State of New York, and delivered the same to the Plaintiff wherein and whereby the Defendant in consideration of the total premium of \$8,307.00 payable \$2769.00 at inception, and a like sum on each annual anniversary date, which sums were paid by the Plaintiff to the Defendant, did insure the Plaintiff against all direct loss and damage by fire and by removal from premises endangered by fire to an amount as follows:

- (a) Building coverage.....\$50,000.00
- (b) Personal Property..... 40,000.00
- (c) Loss of Earnings..... 4,500.00
- (d) Plate Glass Coverage..... 1,500.00

for a term of three (3) years from the 25th day of July 1970 to the 25th day of July 1973, to a masonry building and additions including all permanent fixtures and machinery pertaining to services of said building and personal property contained therein situated at 2100 Richmond Road on the south side of Richmond Road in the Borough and County of Richmond, City and State of New York.

FOURTH: At the time of making issue of said policy of insurance and at all times thereafter until and including the 24th day of October, 1971, Plaintiff was the sole owner/tenant of the properties hereinbefore described.

COMPLAINT

FIFTH: That said policy of insurance numbered 17 SMP 101960 was a standard fire insurance policy as required by the laws of the state of New York.

SIXTH: On the 24th day of October, 1971, while said policy of insurance was in full force and effect, the property hereinbefore described and described in said policy of insurance being the masonry building and additions including all permanent fixtures and machinery pertaining to the services of said building and the personal property contained therein situated at 2100 Richmond Road, was damaged directly by fire in the following amounts:

(a)	Building coverage.....	\$50,000.00
(b)	Personal Property.....	40,000.00
(c)	Loss of earnings.....	4,500.00
(d)	Plate Glass coverage.....	1,500.00
		<u>\$96,000.00</u>

SEVENTH: The Plaintiff gave to the Defendant immediate notice in writing of said loss and damage.

EIGHTH: Within sixty days after said fire and during November of 1971, the Plaintiff rendered to the Defendant written proof of loss, in the form as required by said policy of insurance, in and by which proof the Plaintiff demanded in writing that in case the Defendant failed to agree with the Plaintiff as to the amount of said loss or as to the sound value of said property, as stated

COMPLAINT

in said proof an appraisal as provided in said policy of insurance was to be had by the Defendant but which appraisal was not performed to date for reasons unknown to Plaintiff. The Plaintiff has given the Defendant an appraisal of the losses he has sustained.

NINTH: The Plaintiff before the commencement of this action has duly performed all of the conditions of said policy of insurance on its part; more than sixty days have elapsed since the receipt by the Defendant of said proof of loss required by said policy and before the commencement of this action, and twelve months have not elapsed since said loss and damage occurred.

TENTH: The Defendant has paid to the Plaintiff no part of said sum of NINETY SIX THOUSAND AND 00/100 (\$ 96,000.00) DOLLARS.

WHEREFORE, Plaintiff demands Judgment of the Defendant in the amount of NINETY SIX THOUSAND AND 00/100 (\$96,000.00) DOLLARS, together with interest, costs and disbursements of this action.

EDMUND J. MURPHY
Attorney for Plaintiff
Office & P.O. Address
93 New Dorp Lane
Staten Island, New York 10306
351-7777

COMPLAINT

CORPORATE VERIFICATION

STATE OF NEW YORK, COUNTY OF RICHMOND ss.:

ROBERT DE FRANCO, being duly sworn, deposes and says that deponent is the President of Narrows Promotions, Ltd. the corporation named in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

Deponent is an officer thereof, to-wit, its President. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

NARROWS PROMOTIONS LTD.

By: /s/ ROBERT DE FRANCO

Robert De Franco, President

Sworn to before me, this 16th day of October, 1972

/s/ JOSEPHINE DWELL
Josephine Dwell
Notary Public, State of New York
Qualified in Richmond County
No. 43-6111850
Commission Expires March 30, 1974

PETITION FOR REMOVAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI

Plaintiff

PETITION

-against-

HARTFORD INSURANCE COMPANY

Defendant

-----x

TO THE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK:

The Petition of Hartford Insurance
Company respectfully shows:

1. On October 20th, 1972, an action was commenced against Petitioner in the Supreme Court of the State of New York, in and for the County of Richmond, entitled Narrows Promotions, Ltd. d/b/a Elite Deli, plaintiff, against the Hartford Insurance Company, defendant, by service upon Hartford Insurance Company of a summons and complaint, a copy of which is annexed. No further proceedings have been had therein. The summons and complaint therein constitutes the initial pleading setting forth the claim for relief upon which the action

PETITION FOR REMOVAL

is based, and not more than thirty (30) days had elapsed since the receipt by Petitioner of a copy thereof.

2. The above described action is one of which this Court has original jurisdiction under the provisions of Title 28USC, Section 1332, and is one which may be removed to this Court by the Petitioner, defendant therein pursuant to the provisions of Title 28 U.S.C. Section 1441 in that it is a civil action wherein the matter in the controversy exceeds the sum or value of \$10,000 exclusive of interest and costs and is between citizens of different states.

The plaintiff Narrows Promotions, Ltd. d/b/a Elite Deli at the time this action was commenced was and still is a citizen of the State of New York being a corporation organized under the laws of the State of New York with its principal place of business at 2100 Richmond Road, Borough and County of Richmond, City and State of New York. The Hartford Insurance Company is a citizen of the State of Connecticut, being a corporation organized under the laws of the State of Connecticut with its principal place of business at Hartford Place, Hartford, Connecticut.

3. Petitioner filed herewith a bond with good and sufficient surety conditioned, as provided by Title

PETITION FOR REMOVAL

28 U.S.C. Section 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not revocable or is improperly removed.

WHEREFORE, Petitioner prays that the above action now pending against it in the Supreme Court of the State of New York, in and for the County of Richmond be removed therefrom to this Court.

Dated: New York, N.Y.
November 9th, 1972.

GREENHILL & SPEYER

By: /s/ SIMON GREENHILL
A member of the firm.
Attorneys for the Petitioner
56 Pine Street
New York, N.Y. 10005
(212) 943-1550

PETITION FOR REMOVAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI

Plaintiff

VERIFICATION

-against-

HARTFORD INSURANCE COMPANY

Defendant
-----X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

CARL A. JOHNSON, being duly sworn,
deposes and says:

That he is an officer of HARTFORD INSURANCE COMPANY, to wit, its Resident Vice President; that he has read the foregoing Petition and knows the contents thereof, and the same is true to his knowledge as to the matters alleged therein to be stated, upon information and belief, and as to these matters he believes it to be true; that the source of deponent's information and the grounds of his belief as to all matters in the foregoing Petition not therein stated upon his knowledge, are the complaint herein and public records of incorporation and records and documents in the possession of the Petitioner.

PETITION FOR REMOVAL

/s/ CARL A. JOHNSON
Carl A. Johnson

Sworn to before me this
6th day of November , 1972.

/s/ CARL KREISBERG
Notary Public

CARL KREISBERG
Notary Public, State of New York
No. 24-2199535 Qual. in Kings Co.
Certificate Filed in New York County
Commission Expires Marcy 30, 1973.

NOTICE OF FILING PETITION FOR REMOVAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI

Plaintiff

NOTICE OF FILING
PETITION FOR REMOVAL.

-against-

HARTFORD INSURANCE COMPANY

Defendant

-----x

S I R :

PLEASE TAKE NOTICE that a verified
Petition for Removal of the above-entitled action from
the Supreme Court of the State of New York, County of
Richmond, to the United States District Court for the
Eastern District of New York, together with an Under-
taking on removal, summons and complaint, copies of
which Petition and Undertaking are annexed hereto, were
duly filed this day in the United States District Court
for the Eastern District of New York.

Dated: New York, N.Y.
November 9th, 1972.

NOTICE OF FILING PETITION FOR REMOVAL.

Yours, etc.,

GREENHILL & SPEYER

By: /s/ SIMON GREENHILL
A member of the firm
Attorneys for Defendant
56 Pine Street
New York, N.Y. 10005
(212) 943-1550

TO:

EDMUND J. MURPHY, Esq.
Attorney for Plaintiff
93 New Dorp Lane
Staten Island, N.Y. 10306

CLERK,
Supreme Court, State of New York
County of Richmond

ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
NARROWS PROMOTIONS, LTD., d/b/a :
ELITE DELI, :
Plaintiff, : 72C 1523
-against- : ANSWER
HARTFORD INSURANCE COMPANY, :
Defendant. :
-----x

Defendant, by GREENHILL & SPEYER, its
attorneys, answering the complaint herein, respectfully
alleges upon information and belief:

1. Denies that it has any knowledge or
information sufficient to form a belief as to the truth
of each and every allegation set forth in paragraphs
marked "FIRST" and "FOURTH" of the complaint herein.
2. Denies each and every allegation set
forth in paragraph marked "THIRD" of the complaint herein
except admits issuance of policy No. 17 SMP 101960,
which policy was cancelled effective August 18, 1971, and
said defendant will refer to said policy when produced
upon trial by plaintiff.

ANSWER

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph marked "SIXTH" of the complaint herein.

4. Denies each and every allegation set forth in paragraph marked "SEVENTH" of the complaint herein except admits notice.

5. Denies each and every allegation set forth in paragraph marked "EIGHTH" of the complaint except admits receipt of a purported demand.

6. Denies each and every allegation set forth in paragraph marked "TENTH" of the complaint herein and specifically denies that plaintiff duly performed all the conditions of the policy in that it failed to furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed.

AS AND FOR A FIRST AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

7. That prior to the fire of October 24, 1971 alleged in the complaint, the policy sued upon was cancelled by defendant by notice mailed on July 11, 1971

ANSWER

to plaintiff and First National City Bank, mortgagee, effective thirty-five days after receipt.

8. That at the time of the fire of October 24, 1971, the policy sued upon had been cancelled and was no longer in effect and by reason of the premises, defendant is not liable to plaintiff in any sum whatsoever.

AS AND FOR A SECOND AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

9. That the policy sued upon stipulated that the First National City Bank was a designated mortgagee.

10. That plaintiff has failed to name said First National City Bank as a party plaintiff in its complaint, and by reason of the premises, there is a defect in party plaintiff.

WHEREFORE, defendant demands that the complaint be dismissed with costs and disbursements.

GREENHILL & SPEYER

By /s/ SIMON GREENHILL
A Member of the Firm

Attorneys for Defendant
Office & P.O. Address
56 Pine Street
New York, New York 10005
(212) WH 3-1500

FIRST NOTICE TO AMEND ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----x

NARROWS PROMOTIONS, LTD., d/b/a
ELITE DELI,

Plaintiff,

-against-

HARTFORD INSURANCE COMPANY,

Defendant.
-----x

72C 1523

NOTICE TO AMEND
ANSWER

S I R :

PLEASE TAKE NOTICE that upon the trial of
this action defendant will move to amend its answer
herein to correct typographical errors as follows:

1. In paragraph 2 of the Answer, the
date August 20, 1971 should read "August 18, 1971".
2. In paragraph 7 of the Answer, the
date July 24, 1971 should read "July 14, 1971".

Dated: New York, N.Y.
March 26, 1974.

Yours, etc.,

GREENHILL & SPEYER
Attorneys for Defendant
Office & P.O. Address
56 Pine Street
New York, N.Y. 10005
(212) WH 3-1550

TO:

MARSHALL G. KAPLAN, ESQ.
Of Counsel to Edmund J. Murphy
Attorney for Plaintiff
50 Court Street
Brooklyn, N.Y. 11201

SECOND NOTICE TO AMEND ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

NARROWS PROMOTIONS, LTD., d/b/a
ELITE DELI,

Plaintiff,

-against-

HARTFORD INSURANCE COMPANY,

Defendant.

72C 1523

NOTICE TO AMEND
ANSWER

-----x

S I R :

PLEASE TAKE NOTICE that upon the trial of
this action defendant will move to amend its answer here-
in to contain the following additional language:

AS AND FOR A THIRD AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

11. Subsequent to the cancellation of the
policy as hereinbefore set forth, the defendant, its
agents, servants, employees and others, mailed additional
notices and letters to plaintiff advising it of the can-
cellation of the said policy and performed other acts, all
of which created a situation sufficient to put plaintiff
on notice to make inquiry.

12. By reason of the foregoing defenses the
defendant is not liable to plaintiff in any sum whatsoever.

SECOND NOTICE TO AMEND ANSWER

Dated: New York, N.Y.
March 26, 1974.

Yours, etc.,

GREENHILL & SPEYER
Attorneys for Defendant
Office & P.O. Address
56 Pine Street
New York, N.Y. 10005
(212) WH 3-1500

TO:

MARSHALL G. KAPLAN, ESQ.
Of Counsel to Edmund J. Murphy
Attorney for Plaintiff
50 Court Street
Brooklyn, New York 11201

RULE 9G STATEMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

NARROWS PROMOTIONS, LTD.,
d/b/a ELITE DELI,

Plaintiff,

72C 1523

-against-

RULE 9G STATEMENT

HARTFORD INSURANCE COMPANY,

Defendant.

-----x

Plaintiff contends that there is no genuine issue to be tried on the following material facts:

1. This Court has jurisdiction over the subject matter and the parties on the ground of diversity of citizenship of the action and the action is for a sum in excess of \$10,000 pursuant to 28 U.S.C. 1332.

2. Plaintiff is a New York corporation located at 2100 Richmond Road, Staten Island, New York.

3. Defendant is a Connecticut corporation duly licensed by the Superintendent of Insurance of the State of New York to write fire, among other lines.

4. That defendant issued its policy of insurance No. 17 SMP 101960 covering plaintiff's delicatessen

RULE 9G STATEMENT

and grocery store against the peril of fire, among other perils, for a period of three years effective July 25, 1970, in the principal amount of \$96,000.00.

5. That on October 24, 1971 a fire occurred at the insured's premises causing a total loss.

6. That the policy recited above was on October 24, 1971 in full force and effect.

7. That demand for payment was made on the defendant pursuant to the terms of its policy and payment was refused.

Dated: January 2, 1974.

/s/ MARSHALL G. KAPLAN
MARSHALL G. KAPLAN
Of Counsel to Edmund J. Murphy
Attorney for Plaintiff
50 Court Street
Brooklyn, N.Y. 11201
212 855-7728

To:

GREENHILL & SPEYER, ESQS.
Attorneys for Defendant
56 Pine Street
New York, N.Y. 10005

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----X

4 NARROWS PROMOTION,

5 Plaintiff,

72 C 1523

6 - against -

7 HARTFORD INSURANCE,

8 Defendant.

9 -----X

10 United States Courthouse
11 Brooklyn, New York

12 March 27, 1974
13 10:00 A.M.

14
15 B e f o r e :

16 HON. JOHN R. BARTELS, U. S. D. J.
17
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24 Ilene Ginsberg
Acting Official Court Reporter

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2 **A P P E A R A N C E S:**
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5 **MARSHALL KAPLAN, ESQ.**
6 **Attorney for plaintiff**

7 **GEORGE JANOW, ESQ.**
8 **Attorney for defendant**
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2 THE CLERK: Civil cause for trial, Narrows
3 Promotion v. Hartford Insurance.

4 MR. JANOW: I appear for the defendant.
5 I'd like to get an adjournment. I was recently
6 assigned to this case.

7 THE COURT: You cannot come here on the
8 day of trial and ask for an adjournment. Mr.
9 Greenhill knows better than that. That would
10 knock the schedule of the Court higher than a
11 kite and a lot of people would want this day
12 and thenext two or three days to try a case
13 and we have held it aside for you and now you
14 say you want an adjournment.

15 You can try the case. Bring Mr. Greenhill
16 down or whoever you want.

17 You have been assigned to this case by
18 whom?

19 MR. JANOW: By the firm of Greenhill and
20 Speyer.

21 THE COURT: It is not going to be
22 adjourned.

23 MR. JANOW: I am a new man in the office --

24 THE COURT: You knew this way back when
25 a summary judgment was made. You are charged

1
2 with the notice of it. Greenhill and Speyer
3 knows better than that.

4 MR. JANOW: I have been working on it --

5 THE COURT: If you want to start at
6 two o'clock you may, but you are going to start
7 today.

8 Are you ready, Mr. Kaplan?

9 MR. KAPLAN: I am eager.

10 THE COURT: The case will be tried at
11 two o'clock the latest.

12 Whoever heard of such a thing? Where
13 do you practice? Isn't that terribly incon-
14 siderate? What is the Court to do -- go home,
15 play golf while you get ready?

16 MR. JANOW: It was not so intended.

17 THE COURT: You be prepared to get this
18 case underway at two o'clock.

19 What about the case to be tried two days
20 hence?

21 Two o'clock -- call up your office. Two
22 o'clock the case will be ready for trial --
23 period.

24 (Recess taken)

AFTERNOON SESSION:

THE COURT: All right. We are waiting.

Are you the plaintiff?

MR. KAPLAN: I think your Honor was going to try the affirmative defense -- the issue of the cancellation.

Your Honor, at ten o'clock this morning, what purports to be an amended answer was served on me and if I can inquire into what cancellation notice the defendant is relying on in this case --

THE COURT: Well, it's the same thing, isn't it?

MR. KAPLAN: The original answer alleges --

THE COURT: Nothing new, is there?

MR. JANOW: Substantially nothing new whatsoever.

THE COURT: You know that, Mr. Kaplan, except that it was put in the form of a defense.

MR. JANOW: There was another amendment thereafter, a mistake in date, just a typographical error.

THE COURT: We explored most of this on summary judgment.

MR. KAPLAN: Yes, except there was some

1
2 suggestion at that time when they filed the
3 answer to interrogatories, there was other
4 notices then set forth in the answer but if
5 you are satisfied that the issue is clear, I
6 am satisfied.

7 THE COURT: That is the impression I
8 got and he confirms that.

9 MR. JANOW: That's right.

10 THE COURT: Now, he is suing on the
11 policy and you say you are not liable because
12 you cancelled it so I think what he says is
13 true. There is no use going into the policy,
14 the terms of it and the fact that the fire
15 occurred and what the damages are because all
16 that will be wasted time if you are not liable.

17 MR. JANOW: We were under the impression
18 that the only question to be litigated at this
19 time, to day, was the question of liability.

20 THE COURT: You're right -- that's all.

21 MR. JANOW: Namely, was the policy in
22 force and there was a remark passed by Mr. Kaplan--
23 he says in view of the answer and so forth, it is
24 our burden to go forward.

25 It is our burden to go forward with the

1
2 cancellation proposition but the plaintiff has
3 the burden of proving compliance, otherwise,
4 except as to the question involving damages.

5 THE COURT: I think that's true but I
6 do believe that if you establish actual cancella-
7 tion that ends everything and if you don't then
8 you still have other points to face.

9 MR. JANOW: That's right.

10 THE COURT: I suppose he would have to
11 show compliance, otherwise you'd have to show
12 that the contract was in force and that he com-
13 plied with the terms of the policy and from then
14 on, damages, etc., etc., if you fail to establish
15 cancellation. So, that's all. It is not a diffi-
16 cult problem. I mean, as a matter of law, it is
17 not a difficult problem.

18 MR. JANOW: I think some of the facts can
19 be conceded or agreed upon.

20 THE COURT: Yes. I would say after look-
21 ing at the motion for summary judgment, I believe,
22 Mr. Kaplan, there are certain facts that can be
23 stipulated to and as a matter of fact I think you
24 already did so.

25 MR. KAPLAN: I think the only issue is

1
2 whether on this date in July, they mailed a
3 cancellation notice. I think that is the only
4 issue your Honor has to decide.

5 THE COURT: Well, isn't there more than
6 one --

7 MR. JANOW: There is another defense
8 that does not come into play today with regard
9 to the mortgagee.

10 THE COURT: We are not interested in that
11 today.

12 MR. KAPLAN: The answer alleges that on
13 July 24, 1971, the policy was cancelled by
14 mailing to the plaintiff and First National City
15 Bank, mortgagee and the only issue is with receipt
16 and I understand the only issue for your Honor
17 to understand was whether or not that notice was
18 mailed on July 24, 1971 and I think that is all
19 there is for us to litigate on.

20 If your Honor finds the notice was mailed--
21 and there is a presumption of mailing -- and the
22 plaintiff received the notice then the complaint
23 should be dismissed.

24 THE COURT: I thought you said effective
25 August 20th, 1971? Isn't that what you said?

1
2 He says that prior to the fire notice was
3 mailed on July 24.

4 MR. KAPLAN: Yes, it would be effective
5 in August but I don't want to litigate when it
6 was effective.

7 THE COURT: No; just, did he mail it
8 and did he get it.

9 MR. KAPLAN: Yes.

10 THE COURT: Well, he talks about July
11 24, 1971.

12 MR. JANOW: That's one of the amendments--
13 from the 24th to the 14.

14 MR. KAPLAN: No objection to that--
15 whether the 24th, 14th or 34th.

16 THE COURT: I think you should object
17 to the 34th. I would find that a little diffi-
18 cult.

19 But anyway, as I recall -- I am trying
20 to refresh my memory on this summary judgment
21 motion -- more than one notice was talked about.
22 One is July 12 and then I think you talked
23 about --

24 MR. JANOW: There was a notice sent in
25 May, May 17 -- giving it to your Honor chronologically--

1
2 and briefly, it is this: The position of the
3 defendant is as follows:

4 There was an installment payment due
5 April 25, 1971. That premium payment was not
6 made.

7 Thereafter, skipping over certain corres-
8 pondence had with the plaintiff, the defendant
9 sent out a notice that the policy was cancelled
10 thereafter, specifying a date.

11 THE COURT: When was that sent out?

12 MR. JANOW: Sent out May 17, 1971,
13 effective June 1, 1971 for non-payment.

14 THE COURT: All right.

15 Now then, you have another one?

16 MR. JANOW: Yes sir.

17 Efforts were then made to get him to
18 pay the premium and straighten out, if possible
19 and those are all in writing. No response what-
20 ever came from the plaintiff.

21 Thereafter, on July 13 --

22 THE COURT: Yes. A little while ago you
23 said the 14th.

24 MR. JANOW: May 14 was the first one.

25 THE COURT: May 17.

1
2 MR. JANOW: Yes, the first notice was
3 May 17.

4 THE COURT: All right.

5 MR. JANOW: Effective June 1.

6 THE COURT: Now, your next one is July,
7 what?

8 MR. JANOW: Dated July 13 and deposited
9 in the Post Office July 14, cancellation being
10 effective 35 days thereafter.

11 THE COURT: What would that make it?

12 MR. JANOW: September 20, from my
13 recollection-- no, August 20.

14 THE COURT: All right.

15 MR. JANOW: Nothing was heard from the
16 plaintiff in response to that and the fire
17 occurred October 24, 1971.

18 MR. KAPLAN: May I inquire, if we are
19 going to litigate over both notices now? Are
20 we relying on both notices, one notice, a
21 combination of notices? They need one notice
22 to cancel -- if they have a good one.

23 THE COURT: I imagine he is going to
24 rely on everything.

25 MR. KAPLAN: The both of them?

1
2 THE COURT: I would think so.

3 MR. JANOW: Yes, and also insofar as
4 it effects credibility, if it does.

5 MR. KAPLAN: May I call your Honor's
6 attention to the answer to the interrogatories
7 that were filed.

8 I don't want to make a fuss and stand
9 on technicalities or complete surprise but
10 paragraph 1(b) of the answer is that on July 13
11 1971 they mailed the cancellation notice --
12 not July 14 but July 13.

13 MR. JANOW: It was dated --

14 THE COURT: I don't attach too much
15 importance to it. I saw it.

16 MR. KAPLAN: All right, Judge.

17 THE COURT: Well, all right. I suppose
18 we might as well get right down to the substance
19 of this case.

20 Who are you going to call first?

21 (pause)

22 THE COURT: We are waiting.

23 MR. KAPLAN: Are you waiting for me?

24 THE COURT: No, I guess it is the
25 defendant. We are waiting for you.

1
2 MR. JANOW: I think something should
3 be done by the plaintiff; the policy
4 introduced.

5 THE COURT: Well, you have certain facts
6 you can stipulate to, Mr. Kaplan and I think
7 you have already done so. We will put it down
8 so we understand.

9 MR. KAPLAN: I offer, if your Honor
10 please --

11 THE COURT: Didn't you have a stipulation
12 somewhere in the answer to the summary judgment?
13 Not a stipulation, as such --

14 MR. KAPLAN: The Rule 9(g) statement which
15 agreed on all of this, there was a policy issued
16 July 25, 1970. It had a certain number and
17 amount and covered certain premises.

18 THE COURT: You read it on the record,
19 Mr. Janow.

20 I saw that here a little while ago.
21 Here it is, I suppose. Nine(g), yes.

22 You ought to put that down on the
23 record. I don't know if it is necessary.

24 You admitted that the Court has juris-
25 diction; plaintiff is a New York corporation --

1
2 read it all into the record. The defendant
3 can do that as well as the plaintiff because
4 you are going to take over pretty soon and
5 Mr. Kaplan will say "Yes", he agrees.

6 MR. KAPLAN: Well, all right.

7 I'd offer to stipulate your Honor, that
8 the Court has jurisdiction over the subject
9 matter and the parties on the ground of diver-
10 sity of citizenship --

11 THE COURT: Will you look at 9(g) and
12 read the whole thing to yourself first and
13 decide if there is something you are not going
14 to agree to?

15 MR. KAPLAN: No.

16 THE COURT: But you can take out the
17 numbers. Say 1, 2, 3, 4 --

18 MR. JANOW: Part of four.

19 THE COURT: Part of four.

20 MR. JANOW: We will stipulate number 5.

21 THE COURT: Why don't you look at yours,
22 Mr. Kaplan, for five minutes so you are not
23 pressed and then I think most of it you can
24 stipulate to without prejudice.

25 (pause)

1
2 MR. KAPLAN: On my Rule 9(g) statement
3 we have agreed to stipulate items 1 to 5.

4 That's mine now, not --

5 THE COURT: Isn't it the same thing I
6 have got?

7 MR. KAPLAN: There are two 9(g) statements.

8 THE COURT: Yes. I have looked at his.

9 MR. KAPLAN: Yes. His is much more
10 extensive.

11 THE COURT: You made the motion first.

12 MR. KAPLAN: No. He made it and I
13 cross- moved, your Honor.

14 THE COURT: It is dated December 3,
15 1973. What is your date?

16 MR. KAPLAN: We have agreed 1 to 5 on
17 that and insofar as it is pertinent to this
18 hearing, if at all, a demand was made under
19 number 7 -- a demand for payment and the only
20 thing really in issue is number 6, which I
21 think is what has to be litigated.

22 THE COURT: Well, are you going to let
23 the court reporter copy this?

24 MR. KAPLAN: I will be glad to read it.

25 The attorneys stipulate that this Court

1
2 has jurisdiction over the subject matter on the
3 grounds of diversity of citizenship of the action
4 and the action is for a sum in excess of ten
5 thousand dollars pursuant to 28 U.S.C. 1332.

6 Plaintiff is a New York corporation loca-
7 ted at 2100 Richmond Road, Staten Island, New
8 York.

9 The defendant is a Connecticut corpora-
10 tion duly licensed by the Superintendent of
11 Insurance of the State of New York to write
12 fire, among other lines.

13 The defendant issued its policy of insur-
14 ance number 17 SMP 101960 covering plaintiff's
15 delicatessan and grocery store against the peril
16 of fire, among other perils, for a period of
17 three years effective July 25, 1970, in the
18 principal amount of \$96,000.00.

19 That on October 24, 1971, a fire occurred
20 at the insured's premises causing a total loss --

21 MR. JANOW: I do not concede the last
22 few words.

23 MR. KAPLAN: Causing a loss and that a
24 demand for payment was made and that the defen-
25 dant did not pay the plaintiff any money.

1
2 THE COURT: I don't see anything else.

3 MR. JANOW: Is there a policy being offered
4 in evidence?

5 THE COURT: Offer it in evidence but as
6 a matter of fact, it is attached --

7 MR. KAPLAN: To the moving papers.

8 THE COURT: Offer it.

9 MR. KAPLAN: I offer policy number 17SMP
10 101960 issued by Hartford to Narrows, doing
11 business as Elite Deli, 2100 Richmond Road,
12 Staten Island, New York; 7/25/70 - 7/25/73.

13 THE CLERK: Foregoing marked as plain-
14 tiff's exhibit 1 in evidence.

15 (So marked)

16 THE COURT: Very well.

17 MR. JANOW: This is somewhat unusual in
18 that the plaintiff isn't taking the stand and
19 therefore of necessity, I will call him, but
20 not as my witness. May I describe him as the
21 Court's witness?

22 THE COURT: You go ahead and try your
23 case, Mr. Janow. I will take care of it. If
24 he is hostile I will permit certain questions
25 to be asked but you start it. You can bring the

1
2 plaintiff on as a witness, if you wish.

3 MR. JANOW: I call Mr. DeFrancel.

4 R O B E R T D E F R A N C E L , having
5 first been duly sworn by the Clerk of the Court
6 took the witness stand and testified as follows:

7 THE CLERK: State your name and spell it,
8 please.

9 THE WITNESS: Robert DeFrancel, D-e-
10 F-r-a-n-c-e-l.

11 MR. JANOW: Your Honor, I am going to
12 plead with the Court -- I am unacquainted with
13 the situation. Has the plaintiff rested? Am
14 I on the defendant's case without proof by the
15 plaintiff so I concede the facts stipulated to?

16 THE COURT: As I understand it, there
17 has been evidence introduced that you have
18 executed a policy to the plaintiff covering his
19 premises for I think, some \$96,000.00 and that
20 a fire occurred on the premises and I assume
21 that it is admitted that the policy covered the
22 premises for fire and he now says that you are
23 liable for the loss.

24 That is the position in which the case
25 now stands, as I understand it.

1
2 MR. JANOW: It is a conclusion on the
3 plaintiff's part that we are liable --

4 THE COURT: Then it is a conclusion for
5 the Court to draw or refuse to draw. He claims
6 you are liable, unless you show that the policy
7 is not in force.

8 Let's not waste time with technicalities.
9 Let's get to the issue.

10 DIRECT EXAMINATION

11 BY MR. JANOW:

12 Q Mr. DeFrancel, what business were you engaged in
13 in May and prior to May, 1971?

14 A Delicatessen business.

15 Q And had you procured a policy of insurance from
16 the Hartford Fire Insurance Company?

17 A Yes sir.

18 Q Covering what place or premises?

19 A 2100 Richmond Road.

20 Q What line of business were you in at that time
21 and prior to that time?

22 A I just told you; delicatessen business.

23 Q Since when?

24 A Since when, what?

25 Q Since when were you located there?

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A Fifteen years.

Q Did you procure this policy of insurance from the company in July, 1970?

A Yes.

Q And did you agree to make premium payments?

A Yes.

Q Did you make any premium payments?

A Yes.

MR. KAPLAN: Objection. It is not within the scope of the issues.

THE COURT: I think it is within the scope.

Q Did you pay the entire premium at one time or did you agree to pay it in installments?

A Installments.

Q When or how frequently were those installments to be made?

THE COURT: Now, wait a minute. I think we could shorten it.

You obtained this policy in July 1970. What is the first premium you made, do you know?

THE WITNESS: There was a -- I think it comes to \$4,600.00 for the three years and they got \$1,700.00 the first premium.

1
2 THE COURT: For 1970, \$1,700.00?

3 THE WITNESS: Like the down payment.

4 THE COURT: When was your next premium
5 paid?

6 THE WITNESS: They sent a book with six
7 or eight coupons in it.

8 THE COURT: For the 1971 payment or
9 1970 payment -- which? With eight coupons --
10 seven or eight?

11 THE WITNESS: Seven or eight. I don't
12 remember.

13 THE COURT: They represented the premiums?

14 THE WITNESS: As it went along.

15 THE COURT: Now, did you -- how did you
16 pay that; send a coupon in?

17 THE WITNESS: It was made out, I think,
18 to the Chemical Bank.

19 THE COURT: Did it represent a payment?

20 THE WITNESS: Yes.

21 THE COURT: You bought the coupons when
22 you paid the \$1,700 dollars?

23 THE WITNESS: Right.

24 THE COURT: Now, when they were exhausted
25 what did you do after you exhausted your coupons?

1
2 Did you make any more payments?

3 THE WITNESS: No.

4 They were like yearly -- three year
5 policy but paid yearly.

6 THE COURT: You had eight coupons.
7 That would be two and a half months. It
8 wouldn't be three coupons a year; three
9 coupons?

10 THE WITNESS: It would be the coupon
11 for the balance of the year. They write it
12 for three years and finance it for one year.

13 THE COURT: Perhaps you can explain it.

14 Q You made a down payment and monthly payments
15 thereafter?

16 A That's right.

17 Q How many -- and such an agreement of premium
18 payments was financed by a bank?

19 A Right.

20 THE COURT: Oh, I see.

21 Q And each month you were required and made a pay-
22 ment of how much? Would it help you --

23 A I think it was \$156.00.

24 Q Wasn't it \$254.34?

25 A I couldn't remember the figure exactly.

1
2 Q Have you got your book of coupons that matured
3 each month the first year?

4 A No.

5 Q Have you got the checks showing payment by you
6 for each of the months of the year 1970 to 1971?

7 A We had them but they burnt in the fire. Every-
8 thing was burnt in the fire.

9 Q Did you pay eight monthly installments in the
10 first year of the contract?

11 A Yes.

12 THE COURT: That equals about \$1,700.00,
13 doesn't it?

14 Q To help you, Mr. DeFrancel, I show you a paper
15 and I ask you to kindly read it and also, I ask you whether
16 it has your signature thereon.

17 (Document shown to witness)

18 (pause)

19 A Yes.

20 Q And that is your signature there on the right
21 side of the page?

22 A That's right.

23 MR. JANOW: I offer that in evidence.

24 (Document shown to counsel)

25 MR. KAPLAN: I have no objection but I'd

1
2 like to call to your attention again, whether
3 or not he paid those premiums is not an issue
4 here.

5 THE COURT: May I see it?

6 (Document handed to Court)

7 (pause)

8 THE COURT: Well, this is not a coupon
9 book. This is simply a premium finance agree-
10 ment which also sets forth eight percent finance
11 charge. The cash price was \$2769.00 and a cash
12 down payment of \$553.80 and the amount financed
13 was \$2215.00 plus the finance charge and the
14 amount of each payment was \$254.34 and it looks
15 like -- it says "monthly, nine payments."

16 MR. JANOW: That's right, sir.

17 THE COURT: "The undersigned agrees to
18 make the payments hereunder."

19 MR. KAPLAN: Of course, I will object
20 to the handwritten notation even if anything
21 else is admissible.

22 MR. JANOW: Oh, yes.

23 THE COURT: No question about it. Don't
24 worry about that. All right.

25 THE CLERK: Defendant's exhibit A --

1
2 THE COURT: That is only for the year
3 1970.

4 MR. JANOW: That is the year we are
5 concerned with. There was no other insurance
6 after that or payments made after that.

7 THE COURT: When was the last payment in
8 1970?

9 MR. JANOW: March 25, 1971 was the 8th
10 payment.

11 THE COURT: That was the 8th and not
12 the 9th?

13 MR. JANOW: Right, sir.

14 THE COURT: Where do the coupons come in?

15 MR. JANOW: He got a policy. There was
16 a premium due. He wanted it financed. That
17 paper now marked Defendant's exhibit A --

18 THE CLERK: Exhibit A marked in evidence.

19 (So marked)

20 MR. JANOW: (continuing) was an agreement
21 to pay installments; a cash down payment and
22 nine following installments, each in the sum of
23 \$254.34.

24 He made those payments except the last
25 or 9th payment which is the same thing.

1
2 So, that the April -- the payment due
3 April 25, 1971 was the last payment.

4 THE COURT: No. You said March 25.

5 MR. JANOW: That was paid.

6 THE COURT: Was it the last payment due
7 but he didn't make it? Is that it?

8 MR. JANOW: The April 25, 1971 payment
9 was due but not paid.

10 THE COURT: You havent as yet explained
11 the coupons to me.

12 MR. JANOW: When he executed this premium
13 finance agreement he also got a book with nine
14 coupons and with each payment, each month, he
15 was to remit not only a payment of \$254.34 but
16 also a coupon showing the installment for which
17 it was being paid.

18 THE COURT: Well, the coupon is simply
19 descriptive but has no value.

20 MR. JANOW: None except it identifies
21 the payment with the person and policy.

22 THE COURT: You said you got the money
23 from the bank?

24 THE WITNESS: Chemical Bank I paid.

25 THE COURT: You mean, each month they

1
2 give him a check or what happens?

3 MR. JANOW: He remits to the Chemical
4 Bank a check.

5 THE COURT: And they in turn remit to
6 you?

7 MR. JANOW: That's right.

8 THE COURT: All right. I see.

9 DIRECT EXAMINATION

10 BY MR. JANOW CONTINUING:

11 Q Mr. DeFrancel, tell us if you please, when, in
12 making these payments, did you use a check or some other
13 method?

14 MR. KAPLAN: If the only issue is whether
15 or not he paid up to March I will stipulate it.

16 THE COURT: You know as well as I that
17 we go into these little details and we don't
18 know what they will lead into.

19 We will permit it up to a point. I don't
20 think it is entirely irrelevant.

21 MR. KAPLAN: I will stipulate to it.

22 MR. JANOW: What?

23 MR. KAPLAN: I am willing to stipulate
24 that he paid up to when he said -- when you said
25 he paid up.

Q Did you pay the April installment of \$254.34?

A April?

Q Did you pay the April installment?

A What had to be paid, as far as I recall.

Q By check?

A Yes.

Q Produce the check.

A I just told you everything was burnt in the fire.

THE COURT: No. Wait a minute, Mr.

DeFrancel.

THE WITNESS: Records and everything was burnt in the fire.

THE COURT: Look at this note again and you will see it says nine monthly payments.

THE WITNESS: Yes, I see that -- nine.

THE COURT: Did you make nine or only eight?

THE WITNESS: As far as I know they are all paid.

THE COURT: You made nine monthly payments?

THE WITNESS: As far as I know.

Q By check?

A By check.

Q Where was your bank at that time?

1
2 A I think Community National Bank, some on
3 Banker's Trust and there could have been some drawn on First
4 National.

5 Q Can you get us a letter or a copy of a check
6 that you issued for the April, 1971 payment?

7 A From the bank?

8 Q From the bank.

9 A I will find out which bank had it. If one bank
10 had it they should have it.

11 Q Did you get any mail from the Hartford with
12 respect to the fact that you did not make a payment of \$254.34
13 for the month of April 1971?

14 A I really can't recall now.

15 Q You can't recall.

16 I show you a paper and ask you whether you
17 received this paper from the Hartford?

18 (Document shown to witness)

19 A I can't recall it right now.

20 THE COURT: What is this paper? Show
21 it to him and do you want to mark it in
22 evidence?

23 MR. JANOW: I offer in evidence a
24 premium finance note and agreement dated May
25 17, 1971. There is some handwritten notes not

1
2 being offered.

3 (Document shown to counsel)

4 THE COURT: Is that number 2?

5 THE CLERK: B.

6 MR. KAPLAN: Judge, he says -- I object
7 to this.

8 He didn't say he got this. He says
9 he doesn't recall ever getting it.

10 THE COURT: That's all right. We will
11 take it subject to connection.

12 MR. KAPLAN: All right, your Honor.

13 THE CLERK: Defendant's exhibit B,
14 premium finance note and agreement dated May
15 17, 1971 marked in evidence, subject to
16 connection, as defendant's exhibit B.

17 (So marked)

18 Q Did you, in May, 1971, do business at 2100
19 Richmond Road in Staten Island?

20 A Yes.

21 Q Did you ever make any payments after March 1971
22 under the terms of this policy?

23 A I can't recall. It was three years ago. I
24 can't recall if it was March, April, May, June. I couldn't
25 give you exact dates and figures now. It is three years ago.

1
2 Q That's right.

3 Did you ever make any payments after the 8th
4 payment which matured in March, 1971?

5 A I just told you I couldn't figure it out. It
6 was three years ago.

7 Q I show you a paper dated September 28, 1971,
8 marked "final balance" on the very top of it and I ask you
9 whether you received that?

10 (Document shown to witness)

11 A Was it sent to me or John Piazza? It is a
12 copy --

13 Q Did you ever get the original of that paper
14 which I now show you?

15 A I assume I got this here but I don't recall today.
16 It is three years. I got a lot of papers between now and
17 three years --

18 Q Through the mail, did you get papers?

19 A Through the mail -- however you want to call it
20 but I don't keep a file with me.

21 Q Does the substance of the contents of this paper
22 shown to you, refresh your recollection in any way?

23 A No, it doesn't .

24 MR. JANOW: Offer it in evidence.

25 MR. KAPLAN: Same objection.

1
2 THE COURT: Subject to connection.

3 Final balance premium note -- is it an
4 agreement?

5 MR. JANOW: It shows the balance due
6 from this man.

7 THE COURT: It says "finance note and
8 agreement; premium finance note and agreement"
9 and of course, if it isn't signed -- dated
10 September 28, 1971.

11 What I am still worried about is this:
12 You say when you paid these premium installments,
13 Mr. DeFrancel, you paid them to a bank --

14 THE WITNESS: To a bank, Chemical Bank.

15 THE COURT: Only that bank?

16 THE WITNESS: Yes, paid to that bank.

17 THE COURT: And that bank then would send
18 a premium to Hartford Insurance?

19 THE WITNESS: Automatically. I done that
20 fourteen years. I had the insurance 15 years
21 prior to this. I done the same thing.

22 THE COURT: You had an account at the
23 bank?

24 THE WITNESS: No. The coupon book came
25 from the bank. They gave me the loan and they

Hartford and I paid them.

THE COURT: They would pay Hartford.

THE WITNESS: I done it prior years also.

THE COURT: Yes.

Now, at the end of the month would it be necessary for you to pay the bank anything? If they made a lean to you, then did you pay the loan back to the bank?

THE WITNESS: That was the coupon book with eight or nine coupons. That's the book -- not Hartford -- Chemical Bank.

THE CLERK: Defendant's exhibit C, final balance premium finance note and agreement marked in evidence subject to connection.

(So marked)

MR. JANOW: In a word, the policy is obtained by the plaintiff. He has to pay the premium and arranges to pay it off in installments and then at that time he enters into a premium installment agreement which is defendant's exhibit A, I believe, wherein he agrees to make a downpayment and monthly payments. About that time he gets a book with nine coupons in it and he is required in addition to the downpayment to make monthly payments and when he

1
2 remits a payment or check for payment --

3 THE COURT: He doesn't remit it to
4 you.

5 MR. JANOW: No, no. He remits to the
6 bank.

7 THE WITNESS: Like buying a car and you
8 get a coupon book.

9 THE COURT: I don't know. I don't buy
10 cars with coupon books.

11 MR. KAPLAN: Only if they are for the
12 gas line.

13 THE COURT: I suppose then the bank
14 paid Hartford the full amount of premiums and
15 you are out of it.

16 MR. JANOW: Right.

17 THE COURT: So, you are not interested
18 in monthly payments.

19 MR. JANOW: We are, because the bank
20 tells us they have been paid and pays Hartford
21 or tells Hartford they have not been paid .
22 "Therefore, you remit -- return to us that pay-
23 ment which we anticipated."

24 THE COURT: But in actuality, to begin
25 with, you get paid.

1
2 MR. JANOW: From the bank, yes. They
3 discount that paper.

4 THE COURT: And you get paid.

5 MR. JANOW: Yes sir.

6 THE COURT: Then the next step is --
7 of course, who discounts it for him -- you?

8 THE WITNESS: I pay the discount.

9 THE COURT: Do you go to a bank?

10 THE WITNESS: Yes.

11 MR. JANOW: He makes the agreement with
12 the bank.

13 THE COURT: Do you pick the bank or does
14 he pick the bank?

15 MR. JANOW: The company selects the bank.

16 THE COURT: So they selected Chemical
17 Bank.

18 MR. JANOW: It is, as he says, it is
19 like an automobile. He buys a policy. He wants
20 to finance the premiums and it is done through
21 Chemical Bank, in this instance. They discount
22 the total amount of the premiums.

23 THE COURT: You get your premium all at
24 once; right?

25 MR. JANOW: Right.

1
2 THE COURT: Now, if he doesn't pay the
3 bank then you must return to the bank the amount
4 that they paid?

5 MR. JANOW: Yes sir.

6 THE COURT: And you hold the bag, ultimately,
7 then?

8 MR. JANOW: That's right.

9 THE COURT: Now, under those circumstances,
10 the question of his making payments is one between
11 him and the bank, primarily.

12 MR. JANOW: In the first instance, yes.

13 THE COURT: In the first instance.

14 So, they would know whether or not he
15 paid the nine payments and the bank's records
16 would show that.

17 MR. JANOW: Yes.

18 THE COURT: So, you don't have to get
19 his check.

20 THE WITNESS: He wants me to look at my
21 books --

22 MR. JANOW: To see if a payment was made
23 pursuant to the financial agreement.

24 THE COURT: He has got another bank he
25 used to make the payment with --

1
2 THE WITNESS: Yes.

3 THE COURT: He has an account in the
4 Community Bank and he draws a check from
5 Community to pay Chemical.

6 MR. JANOW: We have written evidence
7 that that premium was not paid.

8 THE WITNESS: Then you don't need my
9 check.

10 THE COURT: That's right. You don't
11 need his check.

12 MR. JANOW: By that question I thought
13 we could shorten the case.

14 THE COURT: Well, if you have it, all
15 right but you may have difficulty in finding
16 it.

17 THE WITNESS: Right.

18 DIRECT EXAMINATION

19 BY MR. JANOW CONTINUING:

20 Q After this notice marked defendant's exhibit C
21 in evidence, did you get this letter from the Hartford dated
22 October 12, 1971?

23 (Document shown to witness)

24 A I assume I did but this don't recollect me now.

25 Q You assume you did?

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A I can't remember a three year letter now.

Q Either you did or didn't.

A I can't remember three years ago. It was addressed to me. I assume I did.

MR. JANOW: I offer it in evidence.

THE COURT: What is the date?

MR. JANOW: October 12, 1971.

MR. KAPLAN: I have no objection to this, but again, your Honor, none of this bears on the issue before you. It makes no difference whether he did or did not pay the premium.

THE COURT: Well, we will take it subject to connection.

Now, this was sent October 12; is that right?

MR. JANOW: Yes.

THE COURT: That is, you say so.

When was the notice of cancellation sent?

MR. JANOW: This is not a notice of cancellation.

THE COURT: I didn't ask that.

MR. JANOW: The notice of cancellation was July 13, deposited July 14, 1971 in the Post Office.

1
2 THE COURT: How do you expect to
3 collect a premium after you cancel a policy?

4 MR. JANOW: Earned premiums. We
5 covered him up to the time that we cancelled
6 the policy.

7 MR. KAPLAN: That's at variance with
8 the answer to the interrogatories.

9 THE COURT: It has not been brought out
10 as to what period nine installments were
11 covered.

12 MR. JANOW: I wanted to try to show
13 in a systematic way, several writings, addressed
14 to the company, all of which have been equivo-
15 cally denied by the plaintiff and now I want to
16 show the notice of cancellation sent out on July
17 14 or deposited at the Post Office.

18 I just want to show that because he
19 denies that he ever got the notice of cancellation
20 of July 13.

21 THE COURT: Yes, but I want to know when
22 the payments mentioned in your letter of October
23 12, 1971 was due and if paid, what period it
24 would cover.

25 You see, you are collecting a premium or

1
2 trying to collect a premium back in October 12,
3 1971. It says "balance due" doesn't it? But
4 it doesn't say for what period.

5 May I see that, please?

6 (Document handed to Court)

7 "Final balance due on your Hartford Insur-
8 ance Group premium payment plan note."

9 Which would indicate that the policy may
10 be still in force.

11 MR. JANOW: Your Honor, this thing has
12 been handled I will admit, somewhat clumsily.
13 For this reason, I have to prove what might have
14 been proved by someone else.

15 This consists of two separate operations
16 all of which accomplish one result. The premium
17 finance situation emanates from one office and
18 they are interested in financing this thing
19 through a bank collecting it in installments
20 and in that way like dating the indebtedness
21 to the company.

22 The cancellation was handled through a
23 Brooklyn office as distinguished from a Man-
24 hattan office. The notice of cancellation
25 came from the Brooklyn office which I haven't

1
2 touched as yet.

3 What I have touched is that which per-
4 tained to the financing of the premium from
5 the Manhattan office.

6 Now, this is the last bit of operation
7 coming from the Manhattan office concerned --

8 THE COURT: I understand that but you
9 haven't told me what period this premium would
10 cover. When would it end; as of what date --
11 what period?

12 MR. JANOW: He executed an agreement,
13 defendant's exhibit A, saying he has to make
14 nine monthly payments.

15 THE COURT: For what period?

16 MR. JANOW: It specifies they are beginning
17 with the first date and terminating April 25, 1971.

18 He made those payments except the last
19 payment which became due April 25, 1971. That
20 payment and that installment loan has not been
21 paid.

22 THE COURT: I get it. All right.

23 THE CLERK: Defendant's exhibit D, a
24 letter from Hartford Insurance Group, October
25 12, 1971, marked in evidence subject to

1
2 connection.

3 (So marked)

4 Q Mr. DeFrancel, did you ever receive, addressed
5 to your firm, at your address, 2100 Richmond Road, the original
6 copy of this notice of cancellation which I show you now?

7 (Document shown to witness)

8 A You mean the one addressed to First National
9 City Bank?

10 Q Did you ever get that, no matter how it is
11 written?

12 A Never got a cancellation notice.

13 Q Did you get the original of that?

14 A Never got any original copy or otherwise of
15 cancellation notice.

16 THE COURT: Forget cancellation notice
17 and look at this particular paper and tell me
18 if you got a copy of the original or not.

19 THE WITNESS: No, I didn't as far as
20 I know.

21 THE COURT: All right.

22 MR. JANOW: I offer this in evidence.

23 MR. KAPLAN: Objection. They have to
24 prove he got it.

25 MR. JANOW: I have the people here.

1
2 MR. KAPLAN: Then let him prove it
3 through his people.

4 MR. JANOW: I want to show his denials --

5 THE COURT: If you object strenuously
6 I wont allow it.

7 MR. KAPLAN: I don't want to do anything
8 strenuously.

9 THE COURT: Well, he says no, so let's
10 wait.

11 How are you going to introduce it in
12 evidence, strictly speaking?

13 MR. JANOW: For identification.

14 THE CLERK: Defendant's exhibit E,
15 notice of cancellation, marked for identifica-
16 tion.

17 (So marked)

18 THE COURT: From whom is that?

19 MR. JANOW: Brooklyn office of the
20 Hartford Insurance Company sent to the plaintiff.

21 THE COURT: This is a nice case but I
22 have so many other cases waiting outside the
23 door that want to come in -- please, let's
24 proceed.

25 Q Mr. DeFrancel, did you ever get a letter in the

1
2 month of July 1971, more particularly, July 27, 1971 from
3 the Charles Benway Agency?

4 MR. KAPLAN: Objection.

5 THE COURT: He can ask the question.

6 A I don't recall, July, 1971, right now, of a
7 letter from him. I might have gotten two or three different
8 letters from him at different times.

9 At what address did he mail it to me? I do
10 know if I got the letter -- where is the letter?

11 Q You said you got several letters?

12 A I said if I got several letters --

13 THE COURT: Did you ever get any letters
14 from him at any time?

15 THE WITNESS: I can't recall it right
16 now, no.

17 THE COURT: What is the name?

18 MR. JANOW: Charles Benway Agency.

19 THE COURT: I am not going to waste
20 time with "I may or may have sometimes."
21 You never got any?

22 THE WITNESS: Right.

23 Q This particular policy you are suing on, did
24 Mr. Benway get that for you as broker?

25 A That is what I am reading here (indicating

document).

THE COURT: Do you know anything about
a broker Benway?

THE WITNESS: Yes.

THE COURT: Where is he located?

THE WITNESS: Victory Boulevard.

THE COURT: Does a bus run along that
line?

THE WITNESS: All buses.

THE COURT: So, you know Charles Benway
and you spoke to him or someone in his office?

THE WITNESS: He asked me now --

THE COURT: I am asking you.

THE WITNESS: Yes.

THE COURT: You have gone there?

THE WITNESS: Yes.

THE COURT: Did you get correspondence
from him?

THE WITNESS: Statements and -- yes.

THE COURT: Do you have any other kind
of insurance with him except fire insurance?

THE WITNESS: My home insurance.

THE COURT: Is it still in existence?

THE WITNESS: Not now. Not now.

1
2 THE COURT: Not Benway?

3 THE WITNESS: No.

4 THE COURT: You got letters from Benway
5 somewhere along the line?

6 THE WITNESS: Yes.

7 Q In 1971?

8 A Yes.

9 Q Did you -- who was your broker who procured this
10 policy?

11 A Originally, the broker was Mary Piazza.

12 THE COURT: Is that in the office of
13 Charles Benway?

14 THE WITNESS: Originally, I did business
15 with Piazza and when they moved Benway took over
16 the insurance prior to the installments.

17 THE COURT: Piazza terminated business
18 completely?

19 THE WITNESS: Yes.

20 Q Did you get word from Mr. Benway that he took
21 that over?

22 A An announcement.

23 Q Approximately when?

24 A I don't recall.

25 THE COURT: He doesn't recall. He got

1
2 some letters but he doesn't recall when.

3 You just know you got letters.

4 THE WITNESS: Yes.

5 DIRECT EXAMINATION

6 BY MR. JANOW CONTINUING:

7 Q When was the first time you did business with
8 Charles Benway?

9 A When it was transferred from Piazza's office to
10 Benway.

11 Q Let's become specific.
12 When was the first time you did business with
13 Benway?

14 A I can't recall the date as of now.

15 Q Do you remember if he procured a license for you
16 to sell beer?

17 A Beer bond.

18 Q When was that, 1970 or 1971?

19 A I couldn't recall. It could be both years. I
20 don't know.

21 Q He got insurance for your private dwelling?

22 A Yes.

23 Q Do you remember when?

24 A No.

25 Q Did he write you letters in that connection?

1
2 A He wrote me letters but in any connection, as
3 to pinpoint one now, I can't.

4 Q You don't remember?

5 A No. It was three years ago.

6 Q When was the first time you called upon Mr.
7 Benway?

8 THE COURT: We are wasting time.

9 MR. KAPLAN: Objection.

10 THE COURT: Sustained.

11 This doesn't mean anything. He doesn't
12 remember any letters he got.

13 Q Did you speak to Mr. Benway?

14 THE COURT: Even if he spoke to him
15 he didn't get the letter.

16 A I spoke to Mr. Benway.

17 Q Did you call at his office?

18 A I spoke to him on the phone and went to his
19 office.

20 Q When?

21 A I don't recall days.

22 THE COURT: Did you talk to him about
23 the fire policy?

24 THE WITNESS: Yes. I called him and
25 told him we had a fire and he said "Come down

1
2 to the office."

3 THE COURT: Was anything said other
4 than that?

5 THE WITNESS: No.

6 THE COURT: Did you go there?

7 THE WITNESS: Yes.

8 THE COURT: What did he say?

9 THE WITNESS: He pulled the files to look
10 over the records.

11 THE COURT: Then, what else? Did he
12 say he was going to pay you?

13 THE WITNESS: No.

14 THE COURT: He said he is not going to
15 pay you? What did you talk about?

16 THE WITNESS: The office was closed when
17 I got there. He said "I'll open it and pull
18 out the records, the files." He said, "I don't
19 know where anything is. My girl runs the office."

20 THE COURT: He doesn't know anything
21 about anything. How do they do business in
22 Staten Island?

23 THE WITNESS: Pretty tough, your Honor.
24 I will tell you the truth.

25 THE COURT: So, he pulls out the files,

1
2 anyway, and says nothing?

3 THE WITNESS: He says "I think there
4 is a cancellation."

5 DIRECT EXAMINATION

6 BY MR. JANOW CONTINUING:

7 Q Did he show you any papers right there and then
8 on that day?

9 MR. KAPLAN: If it is October, 1971 --

10 THE COURT: Let him answer.

11 THE WITNESS: He showed me all the
12 papers. All the files I saw.

13 Q What day of the week did you call at the office?

14 A A holiday.

15 Q What day of the week?

16 A I don't remember if it was Sunday, Monday, Tues-
17 day, Wednesday. Do you remember the day of a holiday three
18 years ago? I don't.

19 THE COURT: In these court proceedings,
20 I understand, Mr. DeFrancel that you want to
21 ask the lawyer questions but that is not
22 permitted. You have to wait until another
23 occasion when you are the lawyer.

24 However, we can find out about holidays,
25 I suppose, in 1970.

1
2 MR. JANOW: I have a 1971 calendar,
3 your Honor. That's the year.

4 THE COURT: Well, that will do it.

5 (Calendar handed to Court)

6 THE COURT: Now, let's see. We are
7 talking about 1971, October, on a holiday.

8 You had October 12 which was on a
9 Tuesday --

10 THE WITNESS: It was the day after
11 the fire. I remember that.

12 THE COURT: When was the fire?

13 MR. KAPLAN: The 24th.

14 THE COURT: That was a Sunday.

15 1971 we are talking about.

16 THE WITNESS: Monday was a holiday.

17 THE COURT: Because of the fire or
18 other reasons?

19 THE WITNESS: Memorial Day or Washing-
20 ton's birthday --

21 THE COURT: Well, we have strange things
22 happening in Washington.

23 Lincoln's birthday -- we pay no atten-
24 tion to Washington's birthday -- is the 18th
25 but I never heard of Memorial Day on October 25.

1
2 THE WITNESS: Veterans Day.

3 THE COURT: Yes. I think so. October
4 25.

5 When did the fire happen, on a Sunday?

6 THE WITNESS: Yes. The next day was
7 a holiday.

8 THE COURT: Back in 1971, did we have
9 these shenanigans as to holiday dates?

10 MR. KAPLAN: I believe so.

11 THE COURT: November 11, it used to be.

12 MR. KAPLAN: But then it was Armistice
13 Day and then it was Veterans Day.

14 THE COURT: Today is not a holiday,
15 is it?

16 MR. KAPLAN: Perhaps we could do something
17 about that, Judge.

18 Q When did you call --

19 THE COURT: He says the day after the fire
20 so it must have been Monday --

21 THE WITNESS: I got to his office.

22 Q You spoke to him and he spoke to you?

23 A Right.

24 Q Did he show you papers?

25 A Yes.

1
2 Q Did he give you a copy of a letter at that time
3 and also a copy of a cancellation notice from the company
4 dated --

5 A He gave me nothing.

6 THE COURT: Did he show you anything?

7 THE WITNESS: Yes, all the papers
8 there I saw.

9 THE COURT: Did he show you the cancella-
10 tion notice?

11 THE WITNESS: Yes.

12 Q Did you ask him for a copy?

13 A No.

14 Q Did he give you a copy?

15 A No.

16 THE COURT: What is the day of the fire?

17 MR. KAPLAN: Twenty-four, October, your
18 Honor.

19 THE COURT: Have you got many witnesses,
20 Mr. Janow?

21 MR. JANOW: Yes. I have seven.

22 THE COURT: We will be here seven or
23 eight days at any rate.

24 MR. JANOW: We want to show that --

25 THE COURT: I know.

1
2 Proceed.

3 MR. JANOW: Here is a situation where
4 the plaintiff does not take the stand and
5 the defendant has to anticipate many things.

6 I will expedite it.

7 THE COURT: No. Don't let me inter-
8 rupt you.

9 I want to estimate when you will
10 finish. Friday morning we have motions so
11 you will have to wait until two o'clock.

12 You know that, Mr. Kaplan.

13 MR. KAPLAN: Yes, but I don't think
14 any of the witnesses are lengthy.

15 MR. JANOW: May I reserve my right
16 to continue with this witness and call the
17 other witnesses?

18 THE COURT: Why don't you finish as
19 much -- are you about finished?

20 MR. JANOW: Yes.

21 THE COURT: Ask him one or two more
22 questions and then start with the other
23 witnesses.

24 MR. JANOW: Your Honor, I will stop
25 at this time with this witness and call the

other people.

MR. KAPLAN: I have two questions.

CROSS EXAMINATION

BY MR. KAPLAN:

Q This building at 2100 Richmond Road, did you have a mortgage on that building with the First National City Bank?

A Yes.

Q Is that the First National City Bank listed here as mortgagee on the policy?

A Yes.

Q Had you deposited the original policy with them when you financed the building?

A Yes.

Q Prior to October 24, 1971 had you ever received any correspondence of any kind from the First National City Bank with reference to this entire insurance policy?

A No.

MR. KAPLAN: No further questions.

MR. JANOW: May I discontinue as indicated before?

THE COURT: Yes, you may.

MR. JANOW: Mrs. Rossi.

ANNA ROSSI,

having first

1
2 been duly sworn by the Clerk of the Court took
3 the witness stand and testified as follows:

4 THE CLERK: State your name and spell
5 it, please.

6 THE WITNESS: Anna , A-n-n-a Rossi,
7 R-o-s-s-i.

8 DIRECT EXAMINATION

9 BY MR. JANOW:

10 Q Mrs. Rossi, whom are you employed by?

11 A The Hartford Insurance Group.

12 Q For what period of time are you so employed?

13 A How many years am I there?

14 Q Yes.

15 A Seventeen years.

16 Q Are you still employed there now?

17 A Yes.

18 Q What is the nature of your work or in what ca-
19 pacity are you employed?

20 A I am in charge of the premium financing.

21 Q In a very brief manner tell his Honor just what
22 that operation consists of. What is a premium finance deal?

23 A Well, the assured has the policy and evidently
24 he doesn't have the money to pay for the installments so he
25 finances it and the producer sends us a financial agreement

1
2 signed by the assured.

3 Q One thing at a time.

4 I show you this paper, defendant's exhibit A,
5 and I ask you if that is the agreement you referred to?

6 A That is the copy of the agreement.

7 Q What goes on after that?

8 A We get the finance agreement signed and wit-
9 nessed from the producer and we check out the figures and send
10 this over to the Chemical Bank that Hartford was doing busi-
11 ness with at that time.

12 They in turn send the producer the check to pay
13 the company for the premium and assured gets a coupon book.

14 In this instance it is a nine monthly payment
15 plan and he gets a coupon for the nine payments.

16 Q Explain what that means -- a nine payment plan
17 coupon book?

18 THE COURT: Who is the producer?

19 THE WITNESS: John Piazza, in this
20 case.

21 THE COURT: He talked about Mary --

22 MR. JANOW: The brokerage was run in
23 the name of John.

24 THE COURT: All right. He was the pro-
25 ducer.

1
2 THE WITNESS: Right.

3 THE COURT: That means that he had
4 written the insurance -- the broker.

5 MR. JANOW: Yes.

6 THE COURT: All right.

7 Q Now, what goes on from that point?

8 A In the meantime, he gets the coupon book and
9 has to pay the Chemical Bank every month.

10 Q Who?

11 A The assured has to submit a coupon book with
12 his payments and send it directly to the Chemical Bank.

13 Every month he makes his payments and we have
14 no problems. The minute he defaults on a payment to the
15 bank the bank notifies the premium finance department.

16 Q Hartford?

17 A Yes.

18 Q Where is your office or where do you work --
19 personally?

20 A 123 William Street.

21 Q In Manhattan?

22 A Yes.

23 Q Go ahead.

24 A And we receive this default notice from the
25 bank and then -- well, my operation is to pull the file and

1
2 give it to the girl to send the acknowledgment of cancella-
3 tion notice out.

4 Q Let's do it methodically.

5 THE COURT: Why talk about acknowledg-
6 ment of cancellation notice? You either have
7 it or you don't.

8 THE WITNESS: This is the routine.

9 THE COURT: It doesn't say on the paper
10 "notice of cancellation"?

11 THE WITNESS: It is not a notice.

12 MR. JANOW: It is a notice from the bank
13 that it has not received the monthly install-
14 ment from the policy holder and they so notify
15 the company because the company sent them that
16 business originally.

17 THE COURT: That's right, but how do
18 you get a cancellation out of it?

19 MR. JANOW: I will show your Honor in
20 one moment.

21 The agreement, defendant's exhibit A,
22 provides in substance for a cancellation;
23 that if the installments are not made the
24 policy will be cancelled.

25 THE COURT: Yes. Let me see that again.

(Document handed to Court)

THE COURT: However, I wasn't addressing myself to that as much as to the word "acknowledgment".

(pause)

THE COURT: Show me where it says that if the installments are not paid that the policy is cancelled.

(Document handed to counsel)

Q Can you point to that?

A Are you referring to the acknowledgment of cancellation that we send out?

Q No -- where you get the right to cancel?

A I don't know where it says that.

Well, it would be here (indicating).

MR. JANOW: Paragraph number 6.

(Document handed to Court)

(pause)

THE COURT: Yes.

"Such default or assignment shall result in the cancellation of said policy."

Q You say where there is a non-payment the bank gives the company some form of notice?

A Yes.

1
2 Q By writing or word of mouth?

3 A In writing.

4 Q I show you a paper or papers and ask you whether
5 that is the type of notice from the bank advising you, the
6 company that no payment has been made?

7 A Right.

8 THE COURT: Well, you have the actual
9 notice in this case. You have the notice.

10 MR. JANOW: These notices.

11 I offer them in evidence.

12 MR. KAPLAN: Are they being offered
13 on the theory that they are binding on this
14 defendant?

15 THE COURT: Have they been offered before?

16 MR. KAPLAN: Not that I know of, your Honor.

17 THE COURT: I think I will take them
18 showing the mechanics of cancellation. Really
19 without them -- I think it all bears on whether
20 actually there was a notice sent.

21 MR. KAPLAN: And bears on whether there
22 was reason to send a notice.

23 THE COURT: Yes. That makes it rele-
24 vant. You expressed it better than I.

25 MR. KAPLAN: The question is, did they

1
2 send a notice, not whether they had the
3 reason.

4 THE COURT: But you deny you received
5 the notice so this would be relevant.

6 MR. KAPLAN: I don't want to argue
7 with your Honor.

8 MR. JANOW: This puts the company on
9 notice that an installment has not been paid
10 and the company proceeds to do something.

11 MR. KAPLAN: I don't think your Honor,
12 Mr. Janow should testify though he is an
13 admirable witness.

14 THE COURT: I don't pay attention to
15 him as a witness. He is just explaining the
16 mechanics.

17 Now, you said this was an acknowledg-
18 ment --

19 THE WITNESS: No, that is not an
20 acknowledgment.

21 THE COURT: This is simply a notice
22 that says that it goes to Narrows Promotions.
23 It is addressed to them.

24 THE WITNESS: May I answer?

25 THE COURT: Yes.

THE WITNESS: It is a form that they have filled out. It comes directly to me at Hartford.

THE COURT: Well, it says "According to our records the amount shown below is now past due."

Of course, it cannot mean you.

THE WITNESS: No.

THE COURT: Because it says "Please preserve your credit standing and avoid additional charges." It says "Installment Loan Department" and this is simply to notify you this hasn't been paid.

THE WITNESS: That's right.

THE COURT: Queer.

Queer form of notice. It is addressed to him.

MR. JANOW: I don't want to say anything lest I am accused of testifying.

It is re this particular person.

THE COURT: It doesn't so state though.

MR. JANOW: It shows the name and address.

THE COURT: It just indicates "Preserve

1
2 your credit." It must be talking to him
3 and not Hartford.

4 There, they want their money back.
5 You mean, they didn't trust Hartford Fire
6 Insurance Company? I suppose, not literally.

7 THE CLERK: Defendant's exhibit F,
8 two notices of default payment from the
9 Chemical Bank.

10 (So marked)

11 Q In furtherance of the premium activity, what is
12 the next thing that was done by Hartford?

13 A Well, we received that reminder notice that the
14 assured had not paid the policy and I pulled the file and
15 gave it to Mrs. Moran to send out the acknowledgment of
16 cancellation.

17 Q She is employed by Hartford in your department?

18 A Right.

19 Q Did you see any writing after Miss Moran worked
20 on what she did?

21 A The writing?

22 Q Yes.

23 A Well, I did see it, right.

24 Q What was it that she sent out -- describe it in
25 a word or two.

1
2 A The acknowledgment of cancellation? Is that
3 what you refer to?

4 Q I refer to defendant's exhibit B (indicating)
5 Is this what she prepared?

6 A Yes.

7 Q Do you see it after she works on it?

8 A Right, I do.

9 Q The she handles it from that point out?

10 A Right.

11 MR. JANOW: That's all.

12 CROSS EXAMINATION

13 BY MR. KAPLAN:

14 Q How many people did you have working for you in
15 May of 1971?

16 A Just Mrs. Moran and I.

17 Q And you were the boss?

18 A Well --

19 Q Now, Mrs. Rossi, what is it that you did after
20 you pulled this file? Did you say something should have been
21 sent to the assured?

22 A Right.

23 Q What should have been sent?

24 A The acknowledgment of cancellation typed by
25 Mrs. Moran.

1
2 Q An acknowledgment of cancellation; is that a
3 notice to him to pay?

4 A Right.

5 Q You want him to pay Chemical Bank?

6 A Right.

7 Q So, when you do that you are telling the assured
8 that the Chemical has notified you that he should pay the
9 Chemical an installment?

10 A Right.

11 Q How many of these did you send out on May 17,
12 1971?

13 A On that particular day 17 went out.

14 THE COURT: You sent 17 out?

15 Q To 17 different assureds?

16 THE COURT: Oh.

17 Q You have a record of who the 17 went out to?

18 A Yes, we do.

19 Q Do you personally remember seeing this going
20 out to a John L. Piazza?

21 THE COURT: Piazza?

22 MR. KAPLAN: Where is the paper? May

23 I have it?

24 (Document handed to counsel)

25 MR. KAPLAN: This is it. All right.

1
2 Q Did you see this typed to a John L. Piazza?

3 A I don't do the typing.

4 Q Somebody else does the typing?

5 A Mrs. Moran.

6 THE COURT: Let me see that because you
7 have Piazza in there.

8 (Document handed to Court)

9 THE COURT: I must come back again and
10 again to what bothers me -- acknowledgment of
11 cancellation by policy holder.

12 THE WITNESS: We assume that he does
13 not want that insurance. He has not made the
14 payment to the bank so we acknowledge that
15 he doesn't want it.

16 THE COURT: Oh, it is your acknowledgment
17 of cancellation.

18 THE WITNESS: Right.

19 THE COURT: That's strange.

20 You send it to Piazza?

21 THE WITNESS: He was the broker of
22 record.

23 THE COURT: And a copy to Narrows too?

24 THE WITNESS: The original goes to them.

25 Q Now, do you have a personal recollection of this

particular piece of paper that the Judge is looking at?

A Why no, I couldn't.

Q You recall it, do you?

A No.

Q You don't recall who the other 16 assureds were; whom you sent a notice to on that day?

A No.

Q Do you have anything to do with mailing anything?

A No.

Q You don't put the papers or envelopes in the mail?

A No, I don't. Mrs. Moran does that.

Q Somebody else is supposed to do that?

A Yes.

Q Who else?

A Mrs. Moran does that.

Q You didn't see anybody mail notices on this day, May 17, 1971 or sometime thereafter?

A No sir.

Q Now incidentally, this notice is dated May 17, 1971. Do you know if it was prepared on May 17, 1971 or some other day?

A It should have gone out that same day.

Q But you don't know of your knowledge whether it

1
2 did or didn't?

3 A It must have.

4 Q Well I know it must have but you didn't see any-
5 body mail it?

6 A No.

7 Q And you didn' personally mail it yourself, did
8 you?

9 A No.

10 MR. KAPLAN: Nothing further.

11 If your Honor please, I'd like to
12 call your attention to the answer to the
13 interrogatories where he gave me a list of
14 witnesses and I don't see a Moran on it.

15 I understand that he is entitled to
16 some latitude but this isn't the Court to
17 try cases on one toe --

18 MR. JANOW: I saw Mrs. Rossi for the
19 first time Tuesday of this week and it was
20 as a result of a conversation had with her
21 that I learned of the whereabouts or the
22 existence of Mrs. Moran.

23 I saw Mrs. Moran for the first time
24 yesterday --

25 MRS. MORAN: On Monday.

1
2 THE COURT: He says why didn't you
3 see Mrs. Rossi sometime ago and then you
4 could put Mrs. Moran's name on the list.

5 MR. JANOW: I am only with the firm
6 two months -- two weeks.

7 THE COURT: Oh, no wonder you asked
8 for an adjournment.

9 MR. JANOW: Two weeks and to days.

10 THE COURT: Mr. Kaplan, are you
11 prejudiced in any way?

12 MR. KAPLAN: If you look -- I am
13 prejudiced -- if your Honor would look at item
14 2(a) of their answer to the interrogatories
15 they say the notice of May 17 delivered by
16 mail clerk, name presently unknown -- if there
17 was a mail clerk that somebody knew about I
18 should have had an opportunity --

19 THE COURT: He didn't know it.

20 MR. KAPLAN: Then if he knows it now he
21 should have told me.

22 THE COURT: What are we talking about?

23 MR. JANOW: Trivia.

24 Mrs. Rossi is head of the Bureau or
25 section and one of the people typing at the firm

1
2 is Mrs. Moran.

3 THE COURT: Take the stand, Mrs. Moran.

4 T H E R E S A M O R A N , having first
5 been duly sworn by the Clerk of the Court took
6 the witness stand and testified as follows:

7 THE CLERK: State your name and spell
8 it for the record, please.

9 THE WITNESS: Theresa Moran, M-o-r-a-n.

10 DIRECT EXAMINATION

11 BY MR. JANOW:

12 Q You are employed by whom?

13 A Hartford Insurance Group.

14 Q Approximately how long a time?

15 A Sixteen years.

16 Q And what kind of work do you do there?

17 A I am a typist.

18 Q Who is your superior, so-called boss?

19 A At the time, Mrs. Rossi.

20 Q So that you took instructions or orders from
21 Mrs. Rossi?

22 A Yes.

23 Q I show you a paper marked defendant's exhibit
24 B and ask you if you handled this paper at any time previously?

25 A Yes I did.

1
2 Q And what did you do and when did you do it with
3 reference to that paper that you now hold in your hand?

4 A I typed the acknowledgment of cancellation.

5 Q And what else did you do at that time?

6 A I typed the name and address of the insured,
7 Narrows Productions.

8 THE COURT: You filled in all the typing?

9 THE WITNESS: Right, exactly.

10 Q When did you do that --

11 THE COURT: You also typed in John Piazza's
12 name?

13 THE WITNESS: I did the entire thing.

14 Q And that was -- was that a singular piece of
15 paper or did they come in sets?

16 A Sets.

17 Q How many?

18 A Four.

19 Q And I show you a -- insets of four.

20 Who addressed the envelopes if any were addressed?

21 A No addressing. It was a window envelope.

22 MR. JANOW: Is it necessary to put that
23 in evidence? I have it handy.

24 THE COURT: You can put in a sample.

25 I know what a window envelope is. It is an

1
2 envelope with a window and you put the
3 notice in that is already typed up so the
4 address and the addressee appears in it, in
5 the window.

6 Right?

7 THE WITNESS: Right.

8 THE COURT: But we will put it in.

9 Show a copy to Mr. Kaplan and see
10 if he has any objection.

11 (Document shown to counsel)

12 (pause)

13 MR. KAPLAN: I find attached to the
14 motion papers a sample of a window envelope.

15 THE COURT: So, you have saved his
16 life, Mr. Kaplan.

17 MR. KAPLAN: Just trying to save the
18 clock a little bit.

19 THE COURT: All right, Mr. Janow, here
20 is a copy attached to your motion papers, I
21 think.

22 MR. JANOW: Yes; summary judgment.

23 MR. KAPLAN: Of course, it has got
24 the Remsen Street address but I assume he
25 shows it for form.

1
2 THE COURT: I have one with the
3 William Street address, yes. All right.

4 THE CLERK: Defendant's exhibit G,
5 window envelope with William Street return
6 address.

7 THE COURT: Is that where you work?

8 THE WITNESS: I do, yes.

9 THE CLERK: Marked defendant's exhibit
10 G.

11 (So marked)

12 THE COURT: Show it to her and ask her
13 if this is the type of envelope she used.

14 Q I show you defendant's exhibit G in evidence
15 and ask you whether you used that kind of envelope?

16 A I do.

17 THE COURT: You did in that particular
18 case? Do you remember putting this notice to
19 Piazza or to DeFrancel --

20 THE WITNESS: Narrows Productions; a
21 right-sided window envelope.

22 Q Where do you get the name and address to put on
23 the notice you type up?

24 A The agreement, the original agreement.

25 Q Financial agreement, referring to exhibit A in

evidence?

A Yes.

Q And then what did you do with the original?

A The original goes to the insured.

Q And what do you do with a duplicate copy?

A The copy goes to John Piazza, the producer
broker.

THE COURT: How many copies did you make
all tolled?

THE WITNESS: Four. There is a snap-out
pack -- four.

THE COURT: Where do the other two go?

THE WITNESS: We keep two in our file.

A pink copy --

Q Is that the one before you?

A This one and there is a blue.

Q Now, when you get through typing up that notice
and other similar notices what do you do next?

A I insert them into the envelopes, right window
side envelopes.

Q Do you do any checking of names and addresses
as they appear through the window envelope and the agreement
from the financing of the premium?

A I do. I type it on the manifold.

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Q I first asked -- oh, I see, I see.

MR. JANOW: Question withdrawn.

Q What else if anything do you type up after you insert the notice in the envelope to the assured?

A The name and address of the assured on the postal manifold.

Q I ask you if this is the paper or manifold you refer to?

A Yes.

MR. JANOW: Offered in evidence.

MR. KAPLAN: I didn't get any of this material with the Rule 34 material. I am completely surprised.

THE COURT: I got that impression from the motion for summary judgment.

MR. KAPLAN: If so, I apologize. If you can find that attachment --

THE COURT: Perhaps Mr. Kaplan, you didn't read the motion papers as well as I did.

MR. KAPLAN: I must have read them. At least I didn't lose.

(pause)

MR. KAPLAN: I see it.

1
2 I have no objection.

3 MR. JANOW: It is exhibit F.

4 THE COURT: It is exhibit H here.

5 THE CLERK: Yes.

6 THE COURT: This is what you call a
7 manifold (indicating)?

8 THE WITNESS: Yes.

9 THE COURT: Show it to her and ask her
10 if she typed this up. It is dated May 17,
11 1971.

12 MR. JANOW: I am trying to show that
13 after addressing the notices --

14 THE COURT: Yes. You had several others
15 that day -- 17 all tolled? And then you took
16 all the envelopes with the notices inside and
17 you put the manifold in the typewriter and
18 put the name on the manifold.

19 Q Then what did you do?

20 A I take the envelopes, wrap the manifold around
21 the envelopes, secure it with a rubber band and the mail boy
22 from the company takes it from me.

23 Q Between the time it leaves your hands and the
24 mail boy from the company picks up the rolled up envelopes
25 with the manifold, where is it kept?

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A On my desk.

3

Q In a particular place or any place?

4

A In front of my desk.

5

Q You see the boy pick it up?

6

A Yes.

7

Q Did you do that on this 17th day of May, 1971?

8

A Yes.

9

Q In due course do you get anything back from

10

the mail boy with regard to the mail that he picks up,

11

such as on this particular day?

12

A We receive this manifold.

13

Q You receive back this manifold?

14

A Yes.

15

Q Does it have something on it that was not on it

16

before the boy took it away?

17

A A stamp from the Post Office.

18

Q Where do you put it?

19

A We put it in a loose-leaf binder book.

20

THE COURT: Let me see that.

21

(Document shown to Court)

22

THE COURT: This stamp shows "New York,

23

NY, Church Street, U.S. Post Office."

24

It also has a stamp on it, hasn't it?

25

THE WITNESS: Umm hum.

1
2 THE COURT: They mail it back to you?

3 MR. JANOW: May I testify?

4 MR. KAPLAN: No.

5 MR. JANOW: What is the harm? It is
6 self-evident.

7 We put postage on it through the mail boy
8 and he is here to testify to that.

9 THE COURT: Why do you have to do that?

10 MR. JANOW: They charge five cents per
11 addressee for each envelope they accept.

12 THE COURT: Oh, so you don't put the
13 postage on the envelope but on the manifold.

14 MR. JANOW: No.

15 MR. KAPLAN: He is becoming a poor
16 witness. He is becoming a poor witness.

17 THE COURT: Don't get upset, Mr. Janow.

18 MR. JANOW: No. I take it where it
19 comes from.

20 THE COURT: Now, now. Don't let it
21 bother you. This happens every day.

22 MR. JANOW: I don't mean you but these
23 snide remarks --

24 THE COURT: Attorneys can't help it.
25 It is an occupational disease with lawyers.

1
2 Don't let it bother you.

3 Tell me about the 85 cents.

4 MR. JANOW: I have the mailman in
5 court to testify.

6 He takes the envelope from Miss Moran,
7 puts it through a postage meter machine paying
8 the required postage, 8, 10 cents. He also
9 stamps through a machine, the 5 cent fee required
10 to be paid for the post office for each envelope
11 he receives and is asked to acknowledge receipt.

12 THE COURT: This is a separate additional
13 charge of the post office?

14 MR. JANOW: Yes sir.

15 THE COURT: And when does he put this
16 stamp on?

17 MR. JANOW: Before he goes to the post
18 office, otherwise, they won't take the postage--
19 not for the receipt.

20 THE COURT: But the envelope.

21 MR. JANOW: Yes, but give him nothing in
22 return.

23 THE COURT: If he wants to mail it with-
24 out anything in return he can but if he wants
25 this he has to put five cents for each letter?

1
2 MR. JANOW: Correct.

3 THE COURT: Now, I want to ask you some
4 questions:

5 I see it says "name of receiving employee."

6 I know it would be difficult to make out
7 what this scribbling is that says EMJ -- do you
8 remember making out this particular manifold?

9 THE WITNESS: Well, that was my job
10 in 1971.

11 THE COURT: I ask you because you made
12 out a number every day, did you not?

13 THE WITNESS: Right.

14 THE COURT: Would you remember this par-
15 ticular one for any reason as distinguished from
16 the others?

17 THE WITNESS: No.

18 THE COURT: How do you know you made it
19 out?

20 THE WITNESS: I was the only one typing.

21 THE COURT: But you do not remember the
22 names now, that you put on there?

23 THE WITNESS: That would be impossible
24 to remember -- every name.

25 THE COURT: Anything particularly unique

1
2 about this manifold that makes you recall
3 it as distinguished from the other manifolds
4 that you made?

5 THE WITNESS: No.

6 THE COURT: How many of these do you
7 make out a day?

8 THE WITNESS: According to the cancella-
9 tion notices we had to type up.

10 THE COURT: You make up more than one?

11 THE WITNESS: Sometimes we make up
12 more than one.

13 THE COURT: How about that day?

14 THE WITNESS: No, because it was 17.

15 THE COURT: I see.

16 You use another sheet if you don't get
17 it all on one sheet.

18 Now, there are a number of articles.
19 What are these numbers?

20 THE WITNESS: The account numbers for
21 each premium finance agreement.

22 THE COURT: I see.

23 You have Narrows Promotions Inc. -- what
24 is the account number of Narrows Promotions Inc.?
25 Do you know?

1
2 THE WITNESS: I wouldn't be able --

3 THE COURT: Does it appear from the
4 record?

5 Is it 382515390?

6 MR. JANOW: That is the account number
7 as it appears on the premium finance note and
8 agreement marked exhibit, defendant's, A.

9 THE COURT: Do you know anything about
10 putting the stamps on the manifold?

11 THE WITNESS: No.

12 THE COURT: That is not your department
13 but the post office boy's department?

14 THE WITNESS: Right.

15 CROSS EXAMINATION

16 BY MR. KAPLAN:

17 Q Was this the only typing you did on that day,
18 do you recall, Mrs. Moran?

19 A No.

20 Q You don't know whether you did more or less
21 typing?

22 A I did more.

23 Q You typed more than the 17 envelopes shown on
24 that manifold?

25 A Right.

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Q You were typing all day long?

A Not all day long.

Q For a substantial part of the day?

A Part of the time.

Q You wouldn't recall exactly how many envelopes
you stuffed that day?

A I have to count how many envelopes and it must
correspond with how many is typed on the manifold.

Q You had one manifold with 17 pieces of mail.
Was that 17 pieces of mail all you did that particular day?

A Yes.

Q For the whole day long you did 17 pieces?

A That particular operation was 17 pieces.

Q But you do or did other operations as well?

A Yes.

Q How many other operations did you do?

A Various different types.

Q Well, in the course of the day would you say you
do 100, 200, 300 envelopes?

A This took care of the envelopes for the day
with different types of work I did.

Q I see.

Did you have anything to do with postage stamps
at any time?

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A No.

Q Did you ever handle them in the course of your work?

A Postage stamps?

Q Yes.

A No.

Q When you wrapped the envelopes, none of them had a postage stamp on them, did they?

A That's right.

Q And nothing else you touched had a postage stamp?

A No.

Q On the floor you worked on, on that particular day, Mrs. Moran, were other women typing or stuffing envelopes that the mail boy picked up?

A I really don't know. We took care of our own department. There is the complete floor --

Q How many typists were on the floor?

A I have no idea.

Q Did you say that somebody came around and took envelopes from your desk?

A The mail boy, mail clerk.

Q Did he have a pushcart of some kind?

A No. They picked up by hand.

Q Did they put it in a receptacle of some kind?

1
2 A I don't know. They have their own procedure
3 after they take the mail from my desk.

4 Q Who is "they"?

5 A The mail boy.

6 Q On May 17, 1971, do you know who the mail boy
7 was?

8 A No.

9 Q Do you know who the mail boy was on any other
10 day in May, 1971?

11 A No.

12 Q You have no specific reason to recollect any-
13 one taking mail from your desk in May, 1971, rather than any
14 other day of the year?

15 A No.

16 Q Was mail picked up at your desk at varying times?

17 A No.

18 Q Were there occasions when you were at your desk
19 or not at your desk when the mail was picked up?

20 A The procedure was when we had our mail ready
21 for the mail boy he came down and picked it up.

22 Q Were you there personally on every occasion the
23 mail was picked up?

24 A Either Mrs. Rossi or myself.

25 Q So, on May 17, 1971, you don't know if you were

1
2 there or Mrs. Rossi. You had no reason to know that.

3 A No, correct.

4 Q Once the mail boy took the mail that was the
5 last you saw of it?

6 A Right.

7 Q You never saw an envelope again or knew what
8 happened to it?

9 A No.

10 MR. JANOW: He is going beyond --

11 THE COURT: Yes. She doesn't say she
12 knew that.

13 Is it the regular course of your business
14 to do this every day?

15 THE WITNESS: Yes.

16 THE COURT: And to write on the manifold
17 the number of window envelopes you will send out?

18 THE WITNESS: Yes.

19 THE COURT: And you'd be doing it how many
20 days?

21 THE WITNESS: It is a Monday to Friday
22 operation.

23 THE COURT: How long are you with the
24 company?

25 THE WITNESS: Sixteen years.

1
2 THE COURT: How long did you do this?

3 THE WITNESS: At least six years.

4 THE COURT: And this is the regular
5 course of business?

6 THE WITNESS: Yes.

7 THE COURT: And the regular course of
8 business is to do it this way?

9 THE WITNESS: Yes.

10 THE COURT: And every day you say, some
11 boy comes down, perhaps not the same one, but
12 it is put in a rubber band and handed to him?

13 THE WITNESS: Yes.

14 THE COURT: Next.

15 MR. KAPLAN: I want to call your atten-
16 tion again that on the answer to the interroga-
17 tories they said specifically, item 2(a),
18 delivered by mail clerk, name presently unknown.

19 The name of Thompson is not on the list
20 of witnesses and the answer to the interrogatories
21 and there was a reason why the interrogatory was
22 demanded and why it was confronted that way.

23 They are pulling witnesses out of the
24 hat --

25 THE COURT: No. When you have a question

1
2 of proving the mechanics of the mail depart-
3 ment it is obvious that you are going to put
4 on some clerk that is a mail clerk or mail
5 boy and they indicated again, in the motion
6 for summary judgment that's what happened.

7 What possible prejudice can come to
8 you because they bring in Mr. Thompson
9 instead of Mr. Jones? They didn't know which
10 one it was at the time.

11 MR. KAPLAN: If it is a question of
12 mechanics, no objection.

13 THE COURT: Obviously, it is going
14 to be that. He is not going to say he took
15 the envelope to Mr. DeFrancel personally and
16 remembers it very well.

17 MR. KAPLAN: No -- to a mail clerk.

18 THE COURT: You didn't hear what I
19 said.

20 MR. KAPLAN: No further questions,
21 your Honor.

22 THE COURT: Call your next witness,
23 Mr. Janow.

24 MR. JANOW: Thomas Thompson.

25 T H O M A S T H O M P S O N, having first

1
2 been duly sworn by the Clerk of the Court took
3 the witness stand and testified as follows:

4 THE CLERK: State your name and spell
5 it, please.

6 THE WITNESS: Thomas Thompson, T-h-o-m-
7 p-s-o-n.

8 MR. JANOW: I forgot to offer this in
9 evidence.

10 MR. KAPLAN: I think it is in.

11 MR. JANOW: No.

12 THE CLERK: Post Office manifold marked
13 as defendant's exhibit H in evidence.

14 (So marked)

15 DIRECT EXAMINATION

16 BY MR. JANOW:

17 Q Mr. Thompson, whom are you employed by?

18 A Hartford Insurance Group.

19 Q And for how long have you been there employed?

20 A Seven years.

21 Q In what end or what department of that company
22 do you work?

23 A Mail department.

24 Q And have you worked there for the last seven
25 years in that department?

1
2 A No sir.

3 Q In 1971 what department were you working in?

4 A Mail department.

5 Q And do you bear any title at this time?

6 A At present, supervisor.

7 Q The previous supervisor had retired recently?

8 A Yes sir.

9 Q Mr. Mosley; correct?

10 A Yes sir.

11 Q Mr. Thompson, in the course of your duties did
12 you, May, 1971, receive mail at the various stations or desks
13 in the Hartford office?

14 A Yes sir.

15 Q Will you describe to his Honor very briefly what
16 are you traveling with when you travel to pick up mail or make
17 deliveries?

18 A In a particular place it is an individual that
19 handles this kind of mail and that is the only mail he handles
20 during the day.

21 Q Does he travel from desk to desk whenever he has
22 to pick up mail with bare hands or have a cart or instrument
23 of some kind?

24 A The man involved only has hands, no material
25 which he carries it with, just his hands.

1
2 Q How does he carry it from the desk to the mail
3 room?

4 A In his hands.

5 Q Was that the system or the practice in May 1971?

6 A Yes.

7 THE COURT: Where does he carry it to --
8 from the desk to where?

9 THE WITNESS: The 11th floor, mail
10 department.

11 THE COURT: What does he do with it
12 there?

13 THE WITNESS: Excuse me, sir?

14 THE COURT: What does he do with the
15 mail on the 11th floor of the mail department?

16 He has manifolds of envelopes which he
17 has picked up from some desk or maybe several
18 manifolds and he takes it up to the 11th floor.

19 THE WITNESS: Yes.

20 THE COURT: What does he do with it up
21 there?

22 THE WITNESS: Takes it out of the
23 rubber band, opens it up, counts the number of
24 envelopes, counts the number of addressees on
25 the manifold to make sure they correspond, which

1
2 in this particular case, there were 17.

3 THE COURT: What else does he do?

4 THE WITNESS: He then posters the
5 meter stamp on each envelope and in turn
6 puts five cents for each envelope on the
7 manifold which equals 85 cents.

8 THE COURT: Then he puts the stamp
9 of five cents for each name on the manifold,
10 right?

11 THE WITNESS: Yes.

12 DIRECT EXAMINATION

13 BY MR. JANOW CONTINUING:

14 Q The manifold you referred to, is that the one
15 I show you now as defendant's exhibit H in evidence?

16 A Yes it is.

17 Q When it was received by the man from the par-
18 ticular desk, Mrs. Moran's desk or hands, you say a count is
19 made of the number of envelopes?

20 A Yes sir.

21 Q And the numeral or number of envelopes are
22 written where on the manifest -- manifold?

23 A On the lower left hand corner, total number of
24 pieces listed by sender.

25 Q What number is there contained?

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A Seventeen.

Q What does he do after metering, meaning putting on the necessary postage on each envelope?

A Yes.

Q And then he adds up the number of envelopes and does he meter the five cents fee for the certificate of mailing?

A Right.

Q Where does he put that on?

A Top right hand corner.

Q And then what does he do?

A He in turn closes it back up, puts the rubber band back around it and hand delivers it to the post office.

THE COURT: What's that?

THE WITNESS: He wraps it back up and hand delivers it to the post office, personally.

THE COURT: There is more than one though. He has one in a package?

THE WITNESS: There are several packages.

THE COURT: Does he carry it in a basket or something?

THE WITNESS: No sir, a valise.

THE COURT: In a valise?

1
2 THE WITNESS: Yes.

3 THE COURT: And goes to the post office?

4 THE WITNESS: Yes.

5 THE COURT: Now, what post office was
6 that in this case -- William Street, Pine Street --
7 isn't there one on Pine Street?

8 Q What was the location of the post office?

9 A New York -- excuse me -- Church Street station,
10 U.S.P.O.

11 Q That is on Church near Barclay?

12 A Yes.

13 THE COURT: That is the big one.

14 THE WITNESS: Yes.

15 Q What happens there, if you know.

16 A The postman at the United States Post Office
17 acknowledges receipt, the same as I did, and stamps it with
18 his seal of approval.

19 Q Does he write anything on the manifold?

20 A He counts the envelopes and number of pieces on
21 the manifold and puts the number of 17 and signs it and puts
22 down the stamp.

23 THE COURT: Do you have two numbers of
24 17 there?

25 THE WITNESS: Yes.

1
2 THE COURT: Let me see that.

3 (Document handed to Court)

4 (pause)

5 THE COURT: Oh, I see.

6 "Total number of pieces received at
7 Post Office, 17."

8 Obviously written by two different
9 people. The 7's are different and EMJ.

10 Q What happens with that manifold later on?

11 A This is then returned to where it was originally
12 picked up in the premium finance department.

13 Q And left there?

14 A Yes sir.

15 THE COURT: What is the last statement?

16 THE WITNESS: The carrier returns to
17 Hartford and returns this particular one to
18 the premium finance department.

19 THE COURT: I see.

20 He brings back the receipt?

21 THE WITNESS: Correct.

22 THE COURT: All right.

23 Let me ask a few questions:

24 You are just talking about generally
25 and that is a regular course of business for

1
2 this to happen in the Hartford Fire Insur-
3 ance Company?

4 THE WITNESS: Yes.

5 THE COURT: For the mail boy to come
6 and pick up this package of mail on the desk,
7 say in this case, from Mrs. Moran, take it
8 up to the 11th floor and then take the band
9 off it and count the number of envelopes on
10 the manifold and then he does put the number
11 17 or whatever it may be, down after he has
12 counted it and then meters the envelopes and
13 then he meters the manifold and he puts the
14 envelopes back in the manifold, puts a rubber
15 band on it and puts it in a valise with other
16 similar bundles of mail, takes it to the post-
17 man, gives it to the postman who counts the
18 envelopes and puts the number of 17 down, also,
19 on the manifold, signs his name and sees
20 whether the manifold is metered and then he
21 gives the manifold back and the carrier brings
22 it back to the Hartford mail department.

23 Is that your testimony?

24 THE WITNESS: Yes sir.

25 THE COURT: Is that the regular course

1
2 of business for the Hartford Insurance Com-
3 pany in the mail department?

4 THE WITNESS: For this particular type
5 of system.

6 THE COURT: What do you mean?

7 THE WITNESS: This would be a special
8 handling.

9 THE COURT: This is called "special
10 handling"?

11 THE WITNESS: I am saying, it is
12 handled special rather than regular first
13 class.

14 THE COURT: This is a regular course
15 of business as far as mailing these cancella-
16 tion notices are concerned?

17 THE WITNESS: Yes sir.

18 THE COURT: You do that regularly each
19 day for that purpose? You pick it up? That's
20 how the mail is handled?

21 THE WITNESS: Yes sir.

22 THE COURT: That is how that particular
23 mail is handled?

24 THE WITNESS: Yes sir.

25 THE COURT: You didn't do it in this case?

1
2 THE WITNESS: No.

3 THE COURT: You do know who did it?

4 THE WITNESS: No sir.

5 THE COURT: And you really can't find
6 out who did it. As far as you know, you don't
7 know who did it that day?

8 THE WITNESS: I don't know.

9 THE COURT: Do they use the same boy
10 for each floor for a length of time or do you
11 change the boys from time to time?

12 THE WITNESS: From time to time.

13 THE COURT: It didn't have to be the
14 same boy each day?

15 THE WITNESS: Excuse me, sir.

16 It is approximately a three month
17 period that that man will handle that function.

18 THE COURT: He may handle the same
19 routine, the same group?

20 THE WITNESS: Yes sir.

21 THE COURT: Then he may be changed and
22 you get somebody else?

23 THE WITNESS: No.

24 THE COURT: Well, but the same man
25 does not handle it for year after year?

THE WITNESS: No sir.

DIRECT EXAMINATION

BY MR. JANOW CONTINUING:

Q The same procedure, is it followed or not followed year after year?

A It is. It is still in existence.

Q And you have been there how long?

A Eight years.

Q Now, before the boy leaves the office of the Hartford, the manifold, does it contain any or did it contain the two rubber stampings that are there now?

A No, it did not.

Q When the boy or man came back with the manifold after leaving the post office what was on the manifold as far as any rubber stamps are concerned?

A These two seals from the post office.

Q One in the upper righthand corner and one in the lower righthand corner?

A Yes.

Q Read those impressions.

A "U.S.P.O. New York, Church Street Station, May 17, 1971."

MR. JANOW: That's all.

THE COURT: And that is the regular

1
2 procedure?

3 THE WITNESS: Yes sir.

4 THE COURT: And you did it regularly
5 too? You didn't alter it in any way? You
6 followed that same procedure day after day?

7 THE WITNESS: Yes sir.

8 CROSS EXAMINATION

9 BY MR. KAPLAN:

10 Q I take it you brought mail over to Church Street
11 station yourself?

12 A Yes.

13 Q When the boy or man goes over to Church does he
14 go alone or with anyone?

15 A By himself unless there is a large quantity of
16 mail.

17 Q But we don't know on this day if the man went
18 by himself or with anyone?

19 A We do not.

20 Q We don't know if there is a large quantity of
21 mail?

22 A We do not.

23 Q So, what you know is from when you went over
24 there yourself. That is the basis of what you know?

25 A Yes.

1
2 Q From your personal experience over at Church
3 Street?

4 A Correct.

5 Q So, you have told the Judge, am I correct, that
6 on the times that you went over there personally, if you give
7 the man 17 pieces of mail, he counts up 17 and stamps that
8 he got 17 pieces of mail?

9 A Correct.

10 Q That is all he does; makes a count and sees
11 that it corresponds to the count -- I've got 17. He counts
12 17 and certifies that he's got 17.

13 A Correct.

14 Q That's all he does, isn't that a fact?

15 A That's a fact.

16 MR. KAPLAN: Thank you.

17 MR. JANOW: Mrs. Vierno.

18 R O S E V I E R N O, having first been
19 duly sworn by the Clerk of the Court took
20 the witness stand and testified as follows:

21 THE CLERK: State your name and
22 spell it, please.

23 THE WITNESS: Rose Vierno, V-i-e-r-n-o.

24 DIRECT EXAMINATION

25 BY MR. JANOW:

Q By whom are you employed?

A Hartford Insurance Company.

Q Approximately how long are you there employed?

A Eleven years.

Q At which office of the company are you employed?

A The Brooklyn office, 175 Remsen Street.

Q What department or what kind of work are you engaged?

A Supervisor, policy writing department.

Q Tell his Honor, in a very brief manner, just what your work is and whom you supervise, if anybody?

A Well, I have 14 girls working in my department. I see to it that the work comes in every day and I have my -- one of my pre-setters -- excuse me -- I have one of my pre-setters sort out the work, pre-set it for typing and I look it over and give it out.

Q Give it out to --

A The typists, girls assigned to the typing.

Q Let's speak specifically of cancellation notices. Are they typed up in your bureau or department?

A Yes, they are typed up in the policy writing department.

Q From whom do you get your instructions?

A From the underwriters.

1

2

Q Is that generally in writing or by word of mouth?

3

A No, that is in writing.

4

Q And let's concentrate particularly now in July,

5

1971 --

6

THE COURT: When you say you get it
from the underwriters, you are talking about
Hartford Insurance Company?

8

9

THE WITNESS: The underwriters working
for Hartford Insurance Company.

10

11

Q What is their function or job?

12

A They write up policies, endorsements, cancella-
tions and send them up to our department to be typed.

13

14

THE COURT: Who would be the underwriter
in this case?

15

16

THE WITNESS: Well, in this case, it is
Jonathan Pon. I happen to know him.

17

18

THE COURT: How does he come into the
picture?

19

20

THE WITNESS: He is the underwriter
who wrote up --

21

22

THE COURT: I thought it was Piazza.

23

THE WITNESS: This is the underwriter.

24

THE COURT: I thought it was Piazza.

25

THE WITNESS: No.

1
2 THE COURT: I thought it was Hartford
3 Insurance.

4 THE WITNESS: Yes, Hartford hires some-
5 one to write it out.

6 THE COURT: So, he is just an employee.
7 Nice title. Actually, Hartford underwrites
8 the insurance.

9 THE WITNESS: I know they hire these
10 men.

11 MR. JANOW: The Judge is right. Dont
12 argue.

13 THE COURT: Oh, you can argue.

14 MR. JANOW: He books the business for
15 the company.

16 THE WITNESS: When a broker wants a
17 policy or endorsement they call an underwriter
18 and they are assigned a certain amount of brokers.

19 THE COURT: He gets a fixed salary and
20 he is assigned a number of brokers and if they
21 want to call for insurance he has to call this
22 so-called particular underwriter.

23 THE WITNESS: Yes.

24 THE COURT: Now, Jonathan Pon, he had
25 under his wing, John Piazza, I guess, right?

1
2 THE WITNESS: No. I think this was
3 Mr. Benway.

4 MR. JANOW: Benway.

5 THE COURT: I get it now.

6 MR. JANOW: Piazza stepped out of the
7 picture at a previous time.

8 THE COURT: I heard that, yes.

9 THE WITNESS: So, when the underwriters
10 scratch up a cancellation or endorsement, what-
11 ever, policy, they send it to my department
12 and we take care of it, look it over and we
13 have to see what sort of form is required.

14 Now, in our company, we have two depart-
15 ments; one consists of property and package
16 and one consists of casualty.

17 Now, Jonathan Pon happened to be with
18 the property and package department.

19 THE COURT: What is the package? I
20 don't know what the package is.

21 THE WITNESS: Well, this is what is --
22 and he worked with the property and package
23 department and Mr. Benson was one of his
24 agents --

25 THE COURT: Benson?

1
2 MR. JANOW: Benway.

3 THE WITNESS: I'm sorry. I always
4 get that name wrong.

5 And he wrote up his cancellation, sent
6 it up to us.

7 THE COURT: Jonathan Pon wrote up a
8 cancellation?

9 THE WITNESS: Right, and sent it up
10 to me.

11 Now, on the property and package cancella-
12 tion we use the form number 2298. That is the
13 proper form for an SMP policy.

14 Q This type of policy?

15 A Yes.

16 Now, after the girl pre-sets or puts the form on
17 I look it over and hand it to one of my typists.

18 Q You say the underwriter makes up something in
19 writing?

20 A A Scratch sheet.

21 Q I show you this paper and ask you if that is
22 what you refer to as a scratch sheet?

23 A Yes. This is the cancellation worksheet.

24 Q You received that in this case?

25 A We received that with the copy of the daily and

1
2 the daily is a copy of a policy.

3 Q Just one minute. Bear with me.

4 MR. JANOW: I offer this in evidence.

5 THE COURT: Daily means a policy?

6 THE WITNESS: A copy of a policy.

7 THE COURT: Why do you call it "copy
8 of a policy"? What has "daily" got to do
9 with it?

10 THE WITNESS: This is what we call
11 it in our office.

12 MR. KAPLAN: I suppose your Honor will
13 take it subject to the same objection I have
14 been making.

15 MR. JANOW: These are instructions given
16 to this lady to prepare cancellation notice.

17 MR. KAPLAN: It is an inter-company
18 communication which I assume that this plaintiff
19 had notice of --

20 MR. JANOW: No, the plaintiff in this
21 case had no notice of this.

22 THE WITNESS: He wouldn't get that.

23 MR. JANOW: Not that particular paper
24 now offered in evidence.

25 This came from a man called Pon to this

1
2 witness instructing the latter to prepare a
3 certain cancellation notice. She called it
4 a scratch sheet.

5 THE CLERK: Defendant's exhibit I.

6 (So marked)

7 THE COURT: This has the name of
8 Jonathan Pon on it?

9 MR. JANOW: Yes sir.

10 THE COURT: And also the name of --
11 well, that's all.

12 THE WITNESS: Right.

13 THE COURT: Doesn't have Benway's name
14 on it.

15 MR. JANOW: No. It is inter-office.

16 THE COURT: And this is the regular
17 procedure to follow?

18 THE WITNESS: Yes.

19 THE COURT: And in the regular course
20 of business you do this?

21 THE WITNESS: Yes.

22 THE COURT: You do it almost every day?

23 THE WITNESS: I do.

24 THE CLERK: Defendant's exhibit I, can-
25 cellation scratch sheet marked in evidence.

(S~~o~~marked)

Q After you receive this you get hold of or there is given to you, a copy of the policy?

A No. That comes attached with a copy of the policy.

Q And in this instance, will you tell his Honor what copy of the policy was attached to this or this to what copy of the policy?

A This was attached to an SMP policy.

When the typists start to type this she gives the name of the insured from the copy of the policy and also the name of the broker and his code number.

Q Does that number of the policy jibe with the number that is one the exhibit A in evidence on this trial?

A Yes.

THE COURT: Let me see that scratch sheet.

(Document handed to Court)

(pause)

THE COURT: They put the number on in blue ink.

Do you know who put that number on?

THE WITNESS: The underwriter does that, Jonathan Pon.

1
2 THE COURT: "Jonathan Pon" is signed
3 in red ink and "Joe Silverman" signed in
4 blue ink and the policy number is put on
5 in blue ink.

6 THE WITNESS: We get it with the
7 number and we match it up with the number
8 of the policy.

9 THE COURT: But the policy is
10 attached?

11 THE WITNESS: They could make a
12 mistake. We make sure.

13 THE COURT: Well, wasn't Jonathan
14 Pon's name put on after Joe Silverman
15 because it looks as though Joe Silverman
16 was put in first and then scratched out
17 and then Pon's name put on.

18 MR. JANOW: It makes no difference
19 whether either or both signed it. It is
20 simply instructions to this lady to type
21 up a certain form.

22 THE COURT: What is the date?

23 MR. JANOW: 7/12/71, meaning July 12
24 1971.

25 THE COURT: I understand it generally

1
2 means that.

3 MR. JANOW: I want to be explicit.

4 Q When you got this paper, this scratch memoran-
5 dum, exhibit I and you looked at the copy of the policy to
6 which it was attached, what was the next thing you did or did
7 you have done?

8 A The next thing I had done was to have it typed
9 and the girl types from the copy of the policy, the name of
10 the insured, the address, the broker's name and code number.

11 THE COURT: You had something typed.

12 What was it?

13 THE WITNESS: We have to give a
14 notice like that --

15 THE COURT: Where is the notice?

16 THE WITNESS: That is the notice
17 (indicating).

18 You see, that happens to be a recall
19 notice which gets 35 days -- the insured
20 gets 35 days to pay.

21 THE COURT: Recall?

22 THE WITNESS: Recall means they want
23 the policy back for a non-payment.

24 Q I show you a paper and ask you whether that is
25 the form used by the girl in filling in the information that

1
2 she does?

3 A Yes -- G2298.

4 Q What is placed on that, if you please?

5 A Policy number, the name of the insured, the
6 mortgagee, if there is one and the producer's name and
7 address and code number and the date they typed it.

8 THE COURT: Wait a minute.

9 We have forms. Don't we have the
10 actual one?

11 THE WITNESS: Yes (indicating).

12 THE COURT: All right.

13 Q I show you a paper and ask you whether this is
14 an exact copy of the set of five forms that you just referred
15 to?

16 A Yes.

17 MR. JANOW: And I offer both of these
18 in evidence.

19 MR. KAPLAN: Same objection, your Honor.

20 THE COURT: Well, I will take it.

21 I don't know why you need the form, if
22 this is the exact same thing.

23 MR. JANOW: Except that this is a
24 singular paper completed and sent out, whereas
25 five copies of the basic form are actually used

1
2 by the girl in typing it up and we want
3 to show you the procedure here.

4 The original goes one place, the
5 copy to a mortgagee, a third to a producer
6 and the rest in the office.

7 THE COURT: Now wait a minute.

8 They are not all alike. This isn't
9 the same form you used before.

10 MR. JANOW: The other thing has
11 nothing to do with this.

12 THE WITNESS: The other was a scratch
13 sheet, your Honor.

14 THE COURT: I see, I see.

15 Now, this one you showed me here, is
16 a mortgagee's copy?

17 THE WITNESS: The mortgagee's copy
18 is always on the top.

19 THE COURT: Then you have copies?

20 THE WITNESS: To the producer.

21 THE COURT: Then you have the insured's
22 copy --

23 THE WITNESS: Right.

24 THE COURT: Then underneath is the
25 company copy, right?

1
2 MR. JANOW: Yes sir.

3 THE COURT: How many do you make out?

4 MR. JANOW: Five.

5 THE COURT: The producer's copy and
6 finally you have the -- I don't know. It
7 is sort of blank -- notice of cancellation --
8 whose copy is this? It doesn't purport to
9 be anybody's.

10 THE WITNESS: It has postal receipts
11 attached to the back.

12 THE COURT: Notice of cancellation,
13 name of insured -- perhaps I cannot see.

14 MR. JANOW: The last one is half a
15 sheet.

16 THE COURT: No. I am talking about
17 this copy here and I will show it to you in
18 a second.

19 The other is post office department,
20 receipt not provided.

21 What about this one? This is a
22 company copy. All right. Yes.

23 Have you put them in evidence yet?

24 MR. JANOW: I offer them now.

25 THE CLERK: Defendant's exhibit J, set

1
2 of five forms, G2298.

3 (So marked)

4 THE WITNESS: Plus two postal receipts.

5 THE COURT: All right, and the other
6 one is defendant's exhibit K, which is
7 actually the company's copy of the alleged
8 notice of cancellation.

9 THE WITNESS: Right.

10 THE COURT: All right.

11 THE CLERK: So marked defendant's
12 exhibit K.

13 (So marked)

14 THE COURT: What is the date of the
15 last one?

16 THE CLERK: 7/13/71.

17 THE COURT: Very well.

18 Let's proceed.

19 DIRECT EXAMINATION

20 BY MR. JANOW CONTINUING:

21 Q After the information is completed there, what
22 happens to the set of five forms, meaning exhibit J -- what
23 takes place with that?

24 A After the typing is done I give it to my
25 assembler. She checks the name, address, policy number and

1
2 the broker's name, code number and makes sure the right
3 amount of days are given and then she makes the distributions.

4 She has one for the insured, one for the pro-
5 ducer, one for the mortgagee and one for our company.

6 Now, on the insured's copy she folds it up and
7 puts it in a righthand window envelope with the name showing
8 out with a copy of the postal receipt clipped to it and then
9 does the same thing for the mortgagee --

10 THE COURT: For each?

11 THE WITNESS: No, no; just the
12 insured and mortgagee.

13 THE COURT: How about the producer?

14 THE WITNESS: The insured and mort-
15 gagee are the only ones that get the mailing
16 certificates. The producer just gets mailed
17 out.

18 THE COURT: Wait a minute. These
19 two get mailing certificates, right?

20 MR. JANOW: The insured and the
21 mortgagee.

22 THE COURT: What are these mailing
23 certificates?

24 THE WITNESS: Now, these mailing
25 certificates are clipped on to the envelope

1
2 and put aside in a separate place.

3 In other words, they are not put
4 in with our regular mail such as policies,
5 endorsements, and so forth.

6 Cancellations and non-payments are
7 put in a separate pile so they don't get
8 mixed up and the postal receipt does not
9 fall off until the mail boy comes up.

10 THE COURT: You put that aside, right?

11 THE WITNESS: Right.

12 THE COURT: What happens next?

13 THE WITNESS: We keep it aside until
14 the mail boy comes and then we give it to him
15 to mail.

16 THE COURT: Let me look at one of
17 those again.

18 (Document handed to Court)

19 (pause)

20 THE COURT: Now, do you get a number
21 of them together?

22 THE WITNESS: Yes.

23 THE COURT: And make a list of them?

24 THE WITNESS: No, we don't make no
25 lists of those.

1
2 THE COURT: They have "post office
3 department, certificate of mailing." What
4 happens to the certificate?

5 THE WITNESS: The mail boy takes it
6 to the post office.

7 THE COURT: What does he do with the
8 certificate of mailing?

9 THE WITNESS: Brings it to the post
10 office to have it certified.

11 THE COURT: What does the post office
12 do with it?

13 THE WITNESS: After the mail boy picks
14 it up from my department he takes over from
15 there.

16 THE COURT: You don't know what the
17 post office does?

18 THE WITNESS: Yes, they stamp it.

19 THE COURT: well, is it addressed --
20 it is received from --

21 MR. JANOW: Does your Honor want to
22 see what actually happened in this case?

23 THE COURT: Yes, I want to see what
24 actually happened.

25 (Document handed to Court)

(pause)

THE COURT: Oh. This is almost like this stamp on the manifold.

MR. JANOW: Except these are individual.

THE COURT: Individually spelled out.

MR. JANOW: Exactly the same.

THE COURT: And you have to pay for these?

MR. JANOW: Five cents for each one in addition to the regular postage.

THE COURT: Yes, of course. This is a special service.

MR. KAPLAN: It used to be called a penny mailer and that is what the cases refer to it as-- before inflation raised the price.

THE COURT: They have a place for a stamp.

MR. JANOW: If I went to the post office and bought an individual stamp I would put it in the upper righthand corner but this is put through with a meter.

1
2 THE COURT: So, the stamp is not
3 for mailing purposes.

4 MR. JANOW: No, just this certifi-
5 cation.

6 I offer it in evidence.

7 THE CLERK: Defendant's exhibit L,
8 two certificates of mailing marked in
9 evidence.

10 (So marked)

11 THE COURT: Let me see. Does anyone
12 sign or initial it?

13 MR. JANOW: It is just stamped.

14 THE COURT: The others had an initial
15 on in addition --

16 MR. JANOW: That was a different
17 form.

18 THE COURT: I understand.

19 Stamped "Brooklyn."

20 All right. Here you are.

21 (Document handed to counsel)

22 DIRECT EXAMINATION

23 BY MR. JANOW CONTINUING:

24 Q Did the company or you ever get back either the
25 letter that was addressed to the Narrows Promotion d/b/a

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Elite Deli?

A Did we ever get them back?

Q Yes.

A After they come back from the post office those particular certificates came back to our department.

Q Did the letter sent to the assured ever come back?

A Oh, no.

Q Did the letter sent to the First National City Bank come back?

A No.

THE COURT: You never asked that question of Miss Moran.

MR. JANOW: She is still here.

MR. KAPLAN: Can I caveat? I didn't want to object but there was no proof that anything was sent to anybody. All they can say is nothing that may have been sent ever came back.

MR. JANOW: She said nothing came back.

MR. KAPLAN: Not that anything was sent.

THE COURT: He says if you didn't send anything it doesn't come back.

MR. JANOW: I appreciate that.

Q The notice of cancellation enclosed in the envelope, addressed to Narrows d/b/a Elite Deli, 2100 Richmond Road, Staten Island -- the envelope containing that notice, did it ever come back to Hartford Insurance Company?

A No.

THE COURT: No, it never came back.

MR. JANOW: That's all.

CROSS EXAMINATION

BY MR. KAPLAN:

Q Am I correct in assuming that you deal with existing insurance policies?

A Yes.

Q Policies that are in force?

A Right.

Q And the underwriter tells you to do something with policies which at that time are in force?

A Right.

Q Now, on July 13, 1971, as far as you know, you were dealing with policies that were in force?

A Yes.

Q You don't have any specific recollection of Narrows Promotions, do you?

A No.

1
2 Q It was one of many that you handled on various
3 days?

4 A Yes. We get loads of them.

5 Q Nothing to distinguish this from anything else?

6 A No.

7 Q But when you did something with these policies
8 you knew there were various designations for what your func-
9 tion was?

10 A I knew what I was doing if that's what you mean.

11 Q Yes.

12 For example, you dealt with cancellation notices?

13 A Yes.

14 Q Is a cancellation notice and recall notice
15 different?

16 A It all depends.

17 If it is a cancellation notice for non-payment
18 we only give them 12 days notice but in this particular case
19 it is a recall and we give them more time which is 35 days.

20 Q So now, what you are talking about in this
21 Narrows Promotion thing, the paper which you say one of your
22 women typed -- you didn't type it, personally?

23 A No.

24 Q One of your typists did?

25 A Yes.

1
2 Q You don't know who?

3 A No.

4 Q This was known as a recall notice giving 35 days
5 notice?

6 A Right.

7 Q And the recall notice means that the company
8 wants this existing policy back from the assured?

9 A For non-payment.

10 Q Is a 35 day notice a non-payment notice?

11 A Yes.

12 Q What is a 12 day notice?

13 A That is also for non-payment but they give the
14 party enough time to make the payments within them 12 days.

15 If they dont come up with the money we send
16 them a recall.

17 Q Is recall always for non-payment?

18 A No, it could be for other reasons.

19 Q What other reasons?

20 A I wouldn't know.

21 Q For excessive losses, excessive claims?

22 A I really don't know --

23 MR. JANOW: She says she doesn't know --

24 A (continuing) We just do what we are told.

25 THE COURT: Let me see it.

(Document handed to Court)

THE COURT: "The below numbered policy issued to the named insured is cancelled as of the effective date dated." Then, the policy number and 35 days after receipt of this notice it is cancelled.

Isn't that what we are talking about here? Whether you call it recall or anything else, it is notice of a cancellation.

THE WITNESS: Yes, but we give them a little more time.

Q Is there any significance to the word "recall" on that piece of paper?

A They want the policy back if they don't send the money.

THE COURT: You are not going to get anywhere, Mr. Kaplan, because as I see it, in the 12 day notice they cancel it and don't ask for the policy back.

On the 35 day notice they ask for the policy back. Why? I don't know. I can't guess the reason.

MR. JANOW: It wouldn't make a difference.

THE COURT: Mr. Kaplan, you are in

1
2 terrible trouble.

3 MR. KAPLAN: The enemy is at my
4 rear. My flanks are breached.

5 Q Do you remember being examined before trial on
6 June 23?

7 A Yes.

8 Q You were asked some questions and signed a
9 transcript?

10 A Yes.

11 Q Do you remember this question and answer --

12 MR. KAPLAN: On page 9, at the bottom:

13 "Q. What kind of information would be
14 on that?

15 "A. It consists of a policy number
16 whether it is a recall or non-payment and
17 that's all. The rest we have to figure out.
18 We have to figure out how many days we have
19 to make it for.

20 "For instance, that SMP for a
21 recall was 45 days or whatever the under-
22 writer specifies. If it is just a non-
23 payment we have to give it 10 days from
24 the mailing date."

25 A That's right.

1
2 Q All I am trying to find out from you is this:
3 To your knowledge, if you know and if you don't please tell
4 me, but to your knowledge, if you know, is there a reason
5 why there is a time difference of 45 days for one notice and
6 10 days for another notice?

7 A No, I don't know. We do what we are told.

8 Q Somebody tells you to give 45 days?

9 A Thirty-five days.

10 Q At that time it was 45 days?

11 A Now it is 35.

12 MR. JANOW: The transcript says 45 but
13 the notice says 35.

14 MR. KAPLAN: I will give the 10 days
15 back.

16 Q To your knowledge, is there some reason you
17 know of why the underwriter --

18 THE COURT: She doesn't know.

19 MR. KAPLAN: Nothing further.

20 MR. JANOW: That's all.

21 I have the man from the mail room
22 here to testify that he took the mail to
23 the Cadman Plaza Post Office and got these
24 receipts in evidence.

25 THE COURT: Put him on then.

MR. JANOW: Mr. Boyle.

THE COURT: That ends your case?

MR. JANOW: No. Beside Mr. Boyle
I have two more short witnesses as well.

THE COURT: All right.

R O N A L D B O Y L E , having first
been duly sworn by the Clerk of the Court took
the witness stand and testified as follows:

THE CLERK: State your name and spell
it, please.

THE WITNESS: Ronald Boyle, B-o-y-l-e.

DIRECT EXAMINATION

BY MR. JANOW:

Q By whom are you employed?

A Hartford Insurance Group.

Q For how long a period?

A Ten years.

Q In what part of the department of the company
are you employed?

A Supervisor of the mail and supply department,
Brooklyn office.

Q 175 Remsen Street, Brooklyn, New York?

A That's right.

Q And in July, 1971, you were so employed?

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A Yes I was.

Q And do you know the routine of handling mail and taking it to the post office where notices of cancellation are involved?

A Yes I do.

Q In the month of July, 1971, did you have reason to see or handle these two pieces of paper which are exhibit L in evidence?

A These particular pieces of paper I wouldnt remember but we did handle them as evidenced by the postage meter stamp on the paper.

Q That indicates that mail was taken from somebody in the Brooklyn office of the Hartford Fire Insurance Company?

THE COURT: Ask him what the practice is.

Q And when mail is so received and it is required to get a certificate of mailing, tell his Honor what is the practice; what is the routine that is engaged in?

A These particular items concerning cancellations are picked up at the policy writing department.

There is an envelope containing the cancellation itself and there is a certificate of mailing attached to the envelope for each piece of paper.

THE COURT: Well, are there quite a

1
2 number of pieces of paper with a certifi-
3 cate of mailing attached?

4 THE WITNESS: There could be anything
5 from one to --

6 THE COURT: You don't count?

7 You pick them up and what do you do?

8 THE WITNESS: They are brought to
9 the mail room and prior to going to the post
10 office we match up each mailing slip.

11 THE COURT: You match up each mailing
12 slip with the envelope?

13 THE WITNESS: Yes, to make sure the
14 addressee is the same and then we affix five
15 cent postage on each mailing slip or certifi-
16 cate of mailing.

17 THE COURT: You meter both the envelopes?

18 THE WITNESS: The envelope at eight
19 cents or the going rate of postage at the time
20 and we meter the certificate of mailing at
21 five cents a piece.

22 THE COURT: Did you ever do that yourself?

23 THE WITNESS: I have on occasion.

24 THE COURT: At the post office, does
25 the person putting the certificate of mailing

1
2 certify that the envelope has a stamp or
3 does he do that automatically?

4 THE WITNESS: There are times when
5 postage is mixed. The envelope skips
6 through the triggering device on the machine.
7 He catches it and then doesn't stamp the
8 certificate.

9 THE COURT: So, he does check the
10 envelope and certificate if it has stamps
11 or metering on it before he stamps the
12 certificate of mailing?

13 THE WITNESS: Yes.

14 THE COURT: And he checks it off with
15 the certificate of mailing address too?

16 THE WITNESS: I don't understand.

17 THE COURT: You have a certificate of
18 mailing and an envelope with the same address.
19 Does the post office man match up the address?

20 THE WITNESS: I imagine so. I really
21 don't know.

22 THE COURT: But he checks the stamps?

23 THE WITNESS: Yes.

24 THE COURT: All right.

25 Q Were these two certificates of mailing, referring

1
2 to exhibit L, brought to your office from the post office on
3 July the 14th, 1971?

4 A Yes they were.

5 Q And did you turn them into the office?

6 A They are then returned to the policy writing
7 department.

8 MR. JANOW: I offer it in evidence.

9 MR. KAPLAN: Same objection.

10 THE COURT: Was that the regular course
11 of business?

12 THE WITNESS: Yes.

13 THE COURT: You did that in the regular
14 course of business?

15 THE WITNESS: Yes.

16 Q Mr. Boyle, during the period that you worked for
17 Hartford these years, was that the method employed in taking
18 out the cancellation notices in envelopes to the post office
19 and getting certificates of mailing from the post office clerk?

20 A Yes.

21 Q And then returning such certificates of deposit
22 or, rather, mailing, to the underwriting department?

23 A Policy writing department.

24 MR. JANOW: Thank you. That's
25 all.

CROSS EXAMINATION

BY MR. KAPLAN:

Q Mr. Boyle, what you have told the Judge, I take it is what you yourself have done personally in picking up this type of mail and handling it?

A On occasion.

Q Is that the basis for the information you have given the Judge?

A I don't understand.

Q What you have done with this type of mail is what you have been telling the Judge about?

A That is what we do in our department.

Q Let's talk about you.

You have done this, personally?

A Yes.

Q That is the basis upon which you are telling the Judge what is done?

A No. This is how it is done and I supervise the operation.

Q You testified in an examination before trial, did you not?

A Yes.

Q To make it brief, Mr. Boyle, when you took this mail or when this mail is taken by somebody -- incidentally,

1
2 we don't know who in July, 1971 did this?

3 A No.

4 Q And it comes into the mail room, is the mailer
5 or the receipt then unclipped from the envelope?

6 A Immediately?

7 Q At some point?

8 A Yes.

9 Q At some point they are physically separated?

10 A Yes.

11 Q And you put the envelopes through this Pitney--
12 Bowes machine?

13 THE COURT: Would it have to be?

14 I don't know.

15 MR. KAPLAN: That is why I want him
16 to tell you.

17 Q You take the envelopes and put them through the
18 Pitney-Bowes machine separate from the mailers?

19 A Yes.

20 Q So, you separate them in two stacks?

21 A Yes.

22 Q And after you put the envelopes through the
23 machine you stack the envelopes back up again?

24 A Yes.

25 Q Tie them up?

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A No, not until we have the receipts finished.

Q Then you separately pull all the receipts from
the mailers?

A Yes.

Q Now, you have a bundle of mailers and envelopes?

A Right.

Q You testified in the examination before trial
that you don't match them up after that?

A No, we don't.

Q You don't know the particular order they are in?

A The same order they went through the machine.

Q Whatever that was?

A They were matched, put through the machine and
they come out in the same sequence.

Q Do you count them?

A No.

Q You don't match them after they are through the
machine?

A No.

Q Somebody then takes the two bundles to the post
office?

A One bundle to the post office, the two bundles
are placed together, rubber banded and taken to the post
office.

Q Is that the post office at Cadman Plaza?

A If that is the post office, yes.

Q Is that done on the same day you pick it up?

A Not always.

Q You picked it up July 13 and the material would
be in the mail room until July 14?

A Possibly.

Q What is the normal business hours there?

A Eight-thirty to four-thirty.

Q At 4:30 everybody goes home?

A No.

Q Do the mail room people stay there?

A They work overtime most of the time.

Q Do they work 24 hours a day or do you go home?

A We go home.

MR. JANOW: Your Honor, entirely
irrelevant.

THE COURT: I don't think we need
this.

MR. KAPLAN: You are the Judge.

THE COURT: Twenty-four hours a day?

MR. KAPLAN: In this case they claim
it was picked up July 13 and they are there
until July 14.

1
2 THE COURT: All right, but whether
3 or not he was up 24 hours a day -- if this
4 was a cocaine case you would want to know
5 about the chain of custody.

6 These letters do not stay in a
7 mailing room more than one day, do they?

8 THE WITNESS: If they are picked
9 up and they are processed they are metered
10 and go directly to the post office.

11 You see, we make one trip to the post
12 office as much as possible.

13 THE COURT: At the end of the day?

14 THE WITNESS: As close as we can.
15 If they come in afterward they stay until the
16 next day.

17 THE COURT: The certificate of mailing,
18 how do you allocate those to any particular
19 groups of envelopes?

20 THE WITNESS: They are separate from
21 all the mail.

22 THE COURT: One bundle and then another
23 so someone has to check them back after the
24 post office. It can't be stamped unless he
25 looks at the address on a particular envelope?

1
2 THE WITNESS: He is certifying that
3 he received that particular mail addressed
4 to that particular mail or envelope.

5 MR. KAPLAN: Objection to the question
6 of the Court and the answer.

7 THE COURT: Overruled.

8 Have you taken them over there?

9 THE WITNESS: Yes.

10 THE COURT: Have you seen the man
11 look at the envelopes and match them up?

12 THE WITNESS: He looks at both but
13 he is reading. I can't tell. I have seen
14 him look at both. I don't know if he is
15 checking the address, postage, or what he is
16 checking.

17 THE COURT: I would think if what you
18 say is true, then he would have to mull
19 through the certificates of mailing to find
20 out what particular envelope it matches up
21 with unless they are in some type of order.

22 THE WITNESS: They are in the same
23 sequence as I put them in the machine.

24 THE COURT: How about the certificates?

25 THE WITNESS: They are too.

1
2 If the postage envelope comes up
3 with a particular envelope or receipt that
4 doesn't have the required postage on it,
5 I get both items back.

6 THE COURT: Therefore, it is allocated
7 right then and there.

8 THE WITNESS: Right. He will not
9 stamp the receipt --

10 THE COURT: Let's get back to the
11 first statement.

12 Are the mailing certificates in the
13 same sequence as the envelopes are metered?

14 THE WITNESS: Yes.

15 THE COURT: I got the impression it
16 would be reverse sequence.

17 THE WITNESS: No. The one on the
18 bottom goes through the machine and comes
19 out on the receiving tray on the other
20 end, on the bottom.

21 THE COURT: So, the receipts should
22 be in the same sequence and when they go
23 to the post office they are in the same
24 sequence.

25 CROSS EXAMINATION

1
2 BY MR. KAPLAN CONTINUING:

3 Q Do you say you had them personally in the same
4 sequence when you personally took them to the post office?

5 A When I personally do the mail the certificates
6 are matched with the envelopes and they are kept in a specific
7 order.

8 Q Look Mr. Boyle, didn't you tell us in the exam-
9 ination before trial that after these things came out of
10 this machine you didn't match them up again?

11 A That's what I said but I didn't say they were
12 not in order.

13 Q You didn't match them up again; that's the
14 fact?

15 A There is no need to.

16 Q Can you answer "yes or no"?

17 Did you personally, at any time you performed
18 this operation, match the receipt to the envelope?

19 A Before I put them --

20 Q After it came out of the machine?

21 A No.

22 Q And when you got it over to the post office,
23 the postal clerk, did You match it up in front of the postal
24 clerk or anybody else?

25 A No.

1
2 Q And in between the time you left 175 Remsen
3 Street and got to 225 Cadman Plaza East (sic) --

4 A No.

5 Q Did you ever see your fellow employees do that
6 matching?

7 THE COURT: No, no. The testimony
8 is, they were already matched up in effect.
9 So, there is no necessity for it.

10 Q How many pieces of mail would you take over at
11 a time?

12 A Anywhere from 1 to 50 to 60 to 100.

13 Q And when you gave the postal clerk the 100
14 mailers they were already stamped, were they not?

15 A Yes.

16 Q So, the Hartford Insurance Company had already
17 paid a nickel to the United States Postal Service for every
18 mailer?

19 A That's right.

20 Q So, whether you gave him 100 mailers in 200
21 envelopes, the post office was not getting any more money
22 from Hartford Insurance?

23 A I don't understand.

24 Q The postal clerk was interested that the stamps
25 were on the mailers and envelopes --

1
2 THE COURT: Do you want to take
3 the stand and testify?

4 MR. KAPLAN: I am an awful witness.
5 Mr. Janow is better than I am.

6 MR. JANOW: That's the second time
7 ad nauseum.

8 THE COURT: Don't get worried, Mr.
9 Janow. Your blood pressure will rise.

10 MR. JANOW: Cheap remark.

11 THE COURT: No, it is not cheap.

12 MR. KAPLAN: A nickel a piece.

13 CROSS EXAMINATION

14 BY MR. KAPLAN CONTINUING:

15 Q When you went to the post office the clerk saw
16 to it that the Pitney-Bowes stamp and meter was on the enve-
17 lope?

18 A What the postal --

19 THE COURT: Your answer is "I don't
20 know"?

21 THE WITNESS: He could be daydreaming for
22 all I know.

23 Q You don't know what he checks when he gets the
24 mailer and envelopes?

25 A I don't know.

1
2 MR. KAPLAN: Nothing further.

3 THE COURT: How many more witnesses?

4 MR. JANOW: Two.

5 THE COURT: Mr. Kaplan?

6 MR. KAPLAN: I was going to call
7 First National City Bank for them to testify
8 that they hadn't gotten it but they said it
9 in the papers, the Rule 34 material.

10 MR. JANOW: The bank received a copy
11 of the same notice of cancellation that the
12 assured received as per receipt.

13 THE COURT: Mr. Kaplan is saying that
14 according to the discovery proceedings they,
15 or at least some clerk there, testified --

16 MR. KAPLAN: A vice president.

17 A lawyer wrote a letter to the company
18 saying they never got a notice of cancellation.

19 The lawyer for the First National City
20 Bank wrote a letter to the Hartford Insurance
21 Company making a claim under the policy and
22 at least from the material that they have
23 submitted to me and that is the source of
24 my information, the First National City Bank
25 said it never got a notice of cancellation.

1
2 I don't offer that for the truth
3 of the fact but I offer it to show --

4 THE COURT: What do you say about
5 this, Mr. Janow?

6 MR. JANOW: That letter Mr. Kaplan
7 refers to was answered --

8 MR. KAPLAN: No question about it --

9 MR. JANOW: (continuing) Just a
10 minute.

11 By the Hartford and a re-produced
12 copy sent to the mortgagee bank showing
13 that this notice of cancellation was sent.

14 The proof of the pudding is that
15 the mortgagee never started proceedings
16 against Hartford.

17 MR. KAPLAN: Only against the mort-
18 gator which was their only right.

19 MR. JANOW: They never did against
20 the mortgagee where they had an absolute
21 right, if it had not been cancelled and I
22 have a letter --

23 THE COURT: What branch was this?

24 MR. KAPLAN: Park Avenue.

25 THE COURT: What are we going to do

1
2 with this, Mr. Janow?

3 Mr. Kaplan, I don't have any evidence
4 before me from First National City Bank
5 one way or the other.

6 MR. KAPLAN: If he wants to stipulate
7 to it I will have your Honor take a look at
8 the papers but I will get the man from the
9 bank and he will say that he never got the
10 letter.

11 THE COURT: His records --

12 MR. KAPLAN: His records show that
13 your people had people up there at the
14 bank to search the records a couple of
15 weeks ago. Maybe Mr. Christberg will tell
16 you, if you ask him.

17 MR. JANOW: Here is the letter.

18 (Document handed to Court)

19 MR. JANOW: Your Honor, the bank
20 isn't a party to this action.

21 THE COURT: Well, this is a claim
22 November 10, 1971 by Michael Bevelacqua and
23 apparently he works in the bank, Mr. Kaplan.

24 MR. KAPLAN: Yes.

25 THE COURT: He is a bank employee and

1
2 he says it is the residential mortgage
3 department, First National City Bank and
4 he says he wants a settlement; that the
5 claim may be settled expeditiously and the
6 claim manager replied to that letter on
7 November 10 saying in substance "We regret
8 we are unable to be of service to you."

9 Do you want to stipulate to the
10 delivery of this letter to the Hartford
11 Insurance Company and you will stipulate
12 that they made this reply? Is that right?

13 MR. KAPLAN: Yes. I'd like him to
14 stipulate, your Honor, that if the First
15 National City Bank was here through a witness,
16 the witness would testify that a search of
17 their records reveals they did not receive
18 a cancellation notice.

19 MR. JANOW: I'd have the right of
20 cross examination to show an error in their
21 statement or background --

22 MR. KAPLAN: All right. I will get
23 the witness.

24 MR. JANOW: I don't care but you don't
25 want me to stipulate to that?

1
2 MR. KAPLAN: God forbid.

3 THE COURT: They didn't sue?

4 MR. KAPLAN: As a legal proposition
5 I don't believe they have the right to sue.

6 THE COURT: I think they would have
7 a terrific right. They had a greater
8 interest than the mortgagor. How much
9 did they lend?

10 MR. KAPLAN: I don't know but they
11 settled with the mortgagees.

12 THE COURT: I guess so but I would
13 think that Hartford Insurance Company would
14 be a great target.

15 MR. JANOW: They have a right under the
16 policy to sue.

17 THE COURT: 1971 -- when does the
18 statute run on it?

19 MR. JANOW: Twelve months.

20 THE COURT: In other words, they
21 are not going to bring any suit.

22 MR. JANOW: No.

23 THE COURT: They were notified in 1971;
24 claim denied --

25 MR. KAPLAN: They were notified that a

1
2 claim was denied by virtue of this letter.

3 THE COURT: They didn't get any
4 money yet.

5 MR. KAPLAN: They got money from the
6 mortgagor.

7 THE COURT: I'm not interested --

8 MR. KAPLAN: They are interested in
9 money.

10 THE COURT: Are you saying that the
11 mortgagor paid back the full amount of the
12 mortgage?

13 MR. KAPLAN: I don't know but I will
14 find out but I do know he had to make an
15 arrangement with them.

16 THE COURT: How much? What did you
17 pay?

18 PLAINTIFF DeFRANCEL: I made another
19 loan to pay them up to date.

20 THE COURT: The full amount?

21 PLAINTIFF DeFRANCEL: They still have
22 a mortgage on it.

23 THE COURT: On the real property?

24 MR. KAPLAN: He repaired and restored
25 the building. In effect, he restored their

1
2 security and he wants to recover the
3 amount of his loss.

4 THE COURT: So, as far as First
5 National, they have suffered no injury.
6 The security is restored and they are
7 getting paid on the mortgage.

8 MR. KAPLAN: So, First National has
9 nothing to complain about.

10 THE COURT: So, they would'nt be
11 interested in any event.

12 I thought this was a total loss?

13 PLAINTIFF DeFRANCEL: I rebuilt it.

14 THE COURT: Ninety-six thousand
15 dollars worth?

16 PLAINTIFF DeFRANCEL: That was contents
17 and stock -- \$86,000.00.

18 THE COURT: You still run a grocery
19 there?

20 MR. KAPLAN: Fixtures, your Honor and
21 the contents as well.

22 THE COURT: That must be a big gro-
23 cery store. Victory near where?

24 PLAINTIFF DeFRANCEL: Richmond Road,
25 Grant City.

1
2 THE COURT: Past Hunter Street?

3 PLAINTIFF DeFRANCEL: Hunter Avenue.

4 THE COURT: How long does it take
5 you to get from the bridge?

6 PLAINTIFF DeFRANCEL: Five, ten minutes.

7 THE COURT: Yes, I know where it is.

8 PLAINTIFF DeFRANCEL: Elite Delicatessen,
9 next to Buda Bakers.

10 THE COURT: Yes, I know where it is.

11 We will reconvene at ten o'clock to-
12 morrow morning but we must finish --

13 MR. KAPLAN: I'd like to finish tomorrow
14 morning.

15 THE COURT: Oh, yes. I have these
16 motions on.

17 MR. KAPLAN: I didn't think it would
18 take this long, Judge. I thought it would
19 be over in one session.

20 THE COURT: Well, we will finish in
21 one hour tomorrow morning.

22 Court adjourned.

23
24
25 (Court adjourned for the day)

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----X

4 WARROWS PROMOTION,

5 Plaintiff,

6 - against -

72 C 1523

7 HARTFORD INSURANCE,

8 Defendant.

9 -----X

10 United States Courthouse
11 Brooklyn, New York

12 March 28, 1974
13 10:00 A.M.

14
15 B e f o r e :

16 HON. JOHN R. BARTELS, U. S. D. J.
17
18
19
20
21
22
23

24 Ilene Ginsberg
25 Acting Official Court Reporter

A P P E A R A N C E S:

MARSHALL KAPLAN, ESQ.
Attorney for plaintiff

GEORGE JANOW, ESQ.
Attorney for defendant.

1
2 THE CLERK: Civil cause on trial,
3 Narrows Promotion v. Hartford Insurance.

4 THE COURT: We have two witnesses
5 here and that's all there is.

6 MR. KAPLAN: I don't anticipate
7 putting anybody on.

8 THE COURT: All right. The last
9 witness was Ronald Boyle.

10 MR. JANOW: Mrs. Motola.

11 B E T S Y M O T O L A, having first
12 been duly sworn by the Clerk of the Court
13 took the witness stand and testified as
14 follows:

15 THE CLERK: State your name and spell
16 it, please.

17 THE WITNESS: Betsy Motola, M-o-t-o-l-a.

18 DIRECT EXAMINATION

19 BY MR. JANOW:

20 Q Miss Motola, what do you do for a living?

21 A I work for Mr. Charles Benway Insurance Agency.

22 Q That firm is known as the Charles Benway Agency?

23 A Yes.

24 Q What is the address?

25 A 1220 Victory Boulevard, Staten Island.

1
2 Q Was the office located there in and before
3 1971?

4 A Yes sir.

5 Q And you worked there at that time and those
6 times?

7 A Yes.

8 Q What kind of work do you do?

9 A I am in charge of the personal line section
10 of the office.

11 Q Would you explain what you mean by "personal
12 line"?

13 A I take care of any fire insurance, homeowner's
14 insurance or what we call package insurance.

15 Q Did there come a time when the name of Harrows
16 Promotions Limited or Elite Deli became known to you?

17 A Yes sir.

18 Q Approximately when, stating the year and the
19 month, if you can?

20 A Well, it would be early 1971.

21 Q If you know, did the Charles Benway Agency,
22 through Mr. Charles Benway, acquire or otherwise get some
23 business through the Piazza Agency?

24 A Yes sir.

25 Mr. Benway took over Mr. Piazza's insurance

1
2 business.

3 Q Was that around December 1, 1970?

4 A Yes, I believe that was approximately the date,
5 sir.

6 Q Did the names of Mr. DeFrancel and Narrows
7 Promotions Limited doing business as Elite Deli become known
8 to you at that time and thereafter?

9 A Yes sir.

10 Q And you had some business dealings with that
11 firm or those firms -- Mr. DeFrancel and the Narrows Promo-
12 tions?

13 A Yes.

14 Q Do you know what kind of insurance covering --
15 what you looked after for those firms?

16 A Yes. It would be the fire insurance.

17 Q Covering what?

18 A The delicatessen which I had down as the Elite
19 Deli.

20 Q Did you know or any address where that business
21 was conducted at the time your firm or the Benway firm took
22 over the Piazza Agency?

23 A Yes I did.

24 Q What was the address?

25 A If I recall, it was 2100 Richmond Road.

Q In where -- Staten Island?

A Staten Island.

Q What other, if any insurance, did your office look after for Mr. DeFrancel or Mr. DeFrancel's interests?

A Mr. Robert DeFrancel's homeowner's insurance.

Q That covered his dwelling or home?

A Yes sir.

Q That was at an address different then the 2100 Richmond Road address?

A Yes sir.

Q Anything else?

A We did handle other insurance for Harrows Promotions or Mr. DeFrancel which I myself may not have handled.

Q But the office did?

A Yes sir.

Q Tell me, in connection with those firms -- Mr. DeFrancel and Mr. DeFrancel's firm the Harrows Promotions -- did you receive any mail from the Hartford Fire Insurance Company in say, the month of May, 1971?

MR. KAPLAN: If your Honor please,
I object to this entire line of questioning unless this is being offered to show she is an employee of Hartford and did something on behalf of them.

Whether she sent the mail or did not, she couldn't effect the cancellation of the policy.

THE COURT: I think he asked if she received --

MR. KAPLAN: Even so, she is the agent of the assured.

THE COURT: I think that is relevant.

Miss Ginsberg, will you read the question again, please?

(Record read by reporter)

THE COURT: Of course, we are not interested in Mr. DeFrancel's personal insurance.

MR. JANOW: I will amend the question.

Q In May, 1971, did you receive any mail from the Hartford Fire Insurance Company concerned with the Narrows Promotions Limited doing business as Elite Deli?

A I would not recall if that was the exact month.

Q Will you look through your files and tell us if you received any communications at any time in 1971, please?

THE COURT: Just take your time and relax.

(pause)

1
2 A I received a recall notice on a certain policy
3 in July -- in the middle of July, 1971.

4 Q To begin with when -- the date when you received
5 the paper -- you just mentioned it?

6 A I received it around July.
7 If the paper I have in front of me says July
8 13 then I would have received it July 14 or 15.

9 Q Of what year?

10 A 1971.

11 Q You say it pertained to what -- Narrows Promo-
12 tions?

13 THE COURT: Why dont you take a
14 look at it and show it to Mr. Kaplan and
15 let's find out what it is about.

16 Show it to Mr. Kaplan.

17 (Document shown to counsel)

18 (pause)

19 MR. JANON: I offer this in evidence.

20 MR. KAPLAN: Objection.

21 I don't know how it is binding on
22 this plaintiff.

23 THE COURT: Of course, without any
24 further connection I am going to sustain
25 the objection but if you -- we can take

1
2 it subject to connection because I think
3 you will have to identify the policy it
4 refers to and when it was received.
5 Roughly speaking, it is July 13, 1971.

6 THE CLERK: Defendant's exhibit M
7 marked in evidence subject to connection,
8 a notice of cancellation, producer's copy.

9 (So marked)

10 Q After receiving this paper, the copy of the
11 cancellation notice, did you communicate with Mr. DeFrance
12 or the Harrows Promotions?

13 A Yes sir.

14 THE COURT: Wait a minute.

15 What policy does it refer to? That's
16 what we want to first find out.

17 Doesn't it show the number there and
18 do we know what it means? Is it this
19 particular policy?

20 MR. JAROW: Yes.

21 THE COURT: There is no testimony
22 to that effect yet.

23 MR. JAROW: I wanted to quickly show
24 what she did by getting in touch and writing
25 to him.

1
2 Q Miss Motola, what was the policy and its number
3 that covered the delicatessen of the Harrows Promotion?

4 A It would be the Hartford Fire Insurance Company.

5 Q What number?

6 A Seventeen SMP 101960.

7 Q Now, when you got this paper --

8 THE COURT: That covered the fire
9 insurance on Harrows Promotions?

10 THE WITNESS: Yes, it does.

11 THE COURT: Known as the Elite Deli
12 located at 2169 Richmond Road.

13 Did you look at the policy and do you
14 know what it covered?

15 THE WITNESS: Yes I do.

16 THE COURT: Very well.

17 Proceed.

18 Q When you received that notice what did you do
19 insofar as Mr. DeFranzel of the Harrows Promotions Limited,
20 Elite Deli, was concerned?

21 A I called the Elite Deli and asked for Mr. Robert
22 DeFranzel.

23 Q On the telephone?

24 A Yes.

25 He wasn't in at the time. I called back a few

1
2 days later and asked for him again and he wasn't available.

3 At that time in as much as it was a cancella-
4 tion notice I stated my business --

5 MR. KAPLAN: I object.

6 MR. JAMOW: I didn't ask her what
7 she stated.

8 THE COURT: Well, you stated your
9 business to somebody.

10 Q And what did you do at that time?

11 A At that time I informed --

12 Q No. Don't tell us of the conversation.

13 You spoke to somebody in the Narrows Promotions
14 Elite Deli?

15 A Correct.

16 Q After you spoke to them and you told them what
17 did you do otherwise?

18 A I asked --

19 Q No --

20 A All right.

21 Q Did you write them?

22 A Yes, I wrote them.

23 Q To whom did you write that letter?

24 A I wrote a letter to Mr. Joseph DeFrancel.

25 THE COURT: Is it Joseph?

1
2 MR. KAPLAN: It is Robert, your Honor.

3 MR. JANOW: I was going to ask but
4 I didn't want to prompt her.

5 THE COURT: You wrote to Joseph?

6 THE WITNESS: Correct; Elite Deli,
7 2100 Richmond Road, Staten Island, New York
8 and I made out my envelope the same way
9 and stamped it as I usually do.

10 Q Did you attach anything to that letter?

11 A Yes sir I did. I attached a photostat of this
12 notice that I gave before.

13 THE COURT: Attached or put inside --
14 which? You put the photostat inside the
15 envelope?

16 THE WITNESS: Yes, with the letter.

17 Q And the paper you say you enclosed with the
18 letter -- you refer to this paper (indicating)?

19 A Yes.

20 Q Defendant's exhibit M.

21 THE COURT: How did you come to
22 write to Joseph DeFrancel?

23 Q Where did you get the name Joseph DeFrancel?

24 A In my telephone conversation with Elite Deli --

25 MR. KAPLAN: Did she talk to the whole

1
2 Deli? It is not even hearsay. It is
3 nothing.

4 THE COURT: I disagree with that.
5 She talked to someone.

6 MR. JAWOW: In that firm.

7 MR. KAPLAN: She talked to someone --
8 period. We don't know who she spoke to.

9 THE COURT: Do you know who you talked
10 to?

11 THE WITNESS: No -- evidently, a
12 clerk.

13 THE COURT: Someone said it was
14 Joseph.

15 THE WITNESS: They told me that
16 Robert DeFrancel was not available and to
17 address my letter to Mr. Joseph DeFrancel
18 at Elite Deli.

19 THE COURT: Didn't you see it was
20 Robert on the policy --

21 THE WITNESS: No --

22 THE COURT: (continuing) of Harrows
23 Promotions.

24 So, you addressed it to Mr. Joseph
25 DeFrancel, Elite Deli.

1
2 Is there a Joseph?

3 PLAINTIFF DeFRANCEL: No, your Honor.

4 MR. JANOW: I offer the letter
5 in evidence in connection also with defen-
6 dan'ts exhibit M.

7 THE COURT: Yes, that is the cancella-
8 tion.

9 MR. KAPLAN: Is this also subject
10 to connection?

11 THE COURT: No. The connection now
12 has been made.

13 MR. KAPLAN: I heard she typed it but
14 that's all we get to.

15 THE COURT: She said she mailed a
16 cancellation notice to Elite Deli.

17 MR. KAPLAN: Objection. It is
18 irrelevant.

19 THE COURT: Overruled, overruled.
20 Did you ever get the letter back?

21 THE WITNESS: No sir.

22 THE COURT: Ever get a call from
23 them after that?

24 THE WITNESS: No, I did not.

25 THE COURT: I see.

1
2 The letter says that he should
3 please call for an appointment and the
4 coverage can be reinstated; that they
5 can replace it.

6 You never got a call back?

7 THE WITNESS: No.

8 THE CLERK: Defendant's exhibit N
9 marked in evidence, letter from Charles
10 Benway.

11 (So marked)

12 Q Where did you mail that envelope with the
13 contents?

14 A At the post office on Manor Road, Staten Island.

15 THE COURT: Did you do it yourself?

16 THE WITNESS: I put that envelope
17 with our mail and every day it goes to that
18 post office.

19 THE COURT: What is the name of that
20 post office?

21 THE WITNESS: Manor Road.

22 Q What is the address of Benway's office?

23 A Victory Boulevard.

24 MR. JANOW: No further questions.

25 CROSS EXAMINATION

BY MR. KAPLAN:

Q Mrs. Motola, 1971, July, how many people were working in Mr. Benway's office?

A Three.

Q Who were they?

A Mrs. Ubell, Mrs. Greger and myself.

Q Can you hear me all right?

A Yes I can.

Q Now, what was your job, specifically?

A My specific job would be to take care of fire insurance, home owner's insurance, etc., etc.

Q And did you do typing?

A Yes sir.

Q Now, you say that some mail went out. When do you say you sent the letter out?

A July 27, 1971.

Q By sending the letter out do you mean to tell us that you personally typed the letter?

A Yes sir.

Q And you personally typed the envelope?

A Yes sir.

Q And you inserted the notice in the envelope with the letter yourself?

A Yes I did.

1
2 Q Then what did you do with the envelope after
3 you did that?

4 A After I typed it and sealed it?

5 Q Yes.

6 A I would stamp it and put it with out office
7 mail.

8 Q And then who took the office mail to the post
9 office?

10 A Mr. Benway generally takes the mail.

11 Q You don't do it yourself?

12 A On occasion I do take the mail, yes.

13 Q But on this particular day you don't have a
14 recollection as to who took the mail?

15 A I do not.

16 Q You don't know if it was Mr. Benway, yourself
17 or someone else?

18 A Correct.

19 Q So, to the best of your recollection you are
20 telling us that the last time you saw this envelope that
21 you typed to a Joseph DeFrancel was when you put the enve-
22 lope in with the office mail?

23 A Correct.

24 Q That you can remember, is that the fact?

25 A Yes.

1
2 Q What happened after that you have no way of
3 knowing, do you?

4 A No.

5 Q Now Mrs. Motola, do you have any idea of how
6 many envelopes you addressed on that particular day?

7 A No sir, I would not know that.

8 Q You don't know how much correspondence went
9 out of the office between you and the other two ladies?

10 A No.

11 THE COURT: Roughly, do you have
12 any idea?

13 THE WITNESS: Seventy-five or a hundred
14 or fifty.

15 THE COURT: Every day?

16 THE WITNESS: Yes.

17 THE COURT: The average is 75?

18 THE WITNESS: I would say so.

19 THE COURT: Is it the regular course
20 of business for you to put the mail in the
21 envelope and address it and stamp it and
22 put it aside for someone to pick it up and
23 take it to the post office?

24 THE WITNESS: Yes.

25 THE COURT: You did this in the regular

1
2 course of business and it was the regular
3 course of business for it to be done in
4 your office -- that was regular procedure?

5 THE WITNESS: Yes.

6 Q Did you know who Mr. Benway's -- incidentally,
7 Mr. Benway is a general broker, is he not?

8 A Yes sir.

9 Q He makes money by placing insurance policies
10 for clients -- DeFrancel or other clients?

11 A Yes.

12 Q Are these people referred to as customers or
13 clients?

14 A Clients.

15 Q He earns his living from these people? He
16 works for them? He is employed by these people?

17 MR. JANOW: If your Honor please --

18 THE COURT: He is an independent
19 contractor. He doesn't work for them any
20 more than a doctor necessarily works for
21 a client, a patient.

22 Q Had you handled Mr. DeFrancel's fire insurance
23 on his home?

24 A Yes sir.

25 Q Was that policy in his name, Robert DeFrancel?

1
2 A Yes sir.

3 Q Did you have a client called Joseph DeFrancel
4 at any time in 1971?

5 A Not that I can recall.

6 Q Not any kind of Joseph DeFrancel?

7 A At that time, not that I can recall.

8 Q Mrs. Motola, do you have the file of this
9 particular policy here?

10 A Which policy?

11 Q This SMP policy we have been talking about.

12 A Yes.

13 Q May I have the record, please?

14 (Documents handed to counsel)

15 MR.JANOW: I may say, ordinarily it
16 is objectionable but I will let him have his
17 way.

18 THE COURT: What he wants is the policy.

19 MR.JANOW: The whole file on this
20 policy.

21 THE COURT: All right. Let him look
22 at it.

23 Q Now Mrs. Motola, to the best of your knowledge
24 in July of 1971 was this policy, this 17 SMP 101960 in full
25 force and effect?

1
2 THE COURT: What date?

3 MR. JANOW: Your Honor --

4 MR. KAPLAN: Please.

5 THE COURT: Oh, please. Don't
6 show such agony and pain and suffering.

7 He has a right to object but let
8 him finish before you object, Mr. Janow.

9 MR. KAPLAN: I wanted to answer your
10 Honor's question.

11 Q In July -- 14, 15 -- July 20th, 1971, to the
12 best of your knowledge, was this policy in full force and
13 effect?

14 MR. JANOW: Objection.

15 THE COURT: I will allow it.

16 A Yes.

17 Q It was?

18 A Yes.

19 THE COURT: That is of course, a legal
20 conclusion.

21 MR. JANOW: That was the basis of
22 my objection.

23 Q Let me ask it of you this way then: Before July
24 14, 1971, had you received any notice from anybody that this
25 policy had been cancelled?

1
2 A I myself, no.

3 Q Do you have a record of it anywhere in the
4 office?

5 A No.

6 Q Now, beside this policy, do you have corres-
7 pondence affecting this policy between your assured, your
8 client and the carrier?

9 A I would have one other piece of correspondence
10 in which they advised Harrows Promotions --

11 Q May I see it?

12 THE COURT: Let her finish.

13 A (continuing) Where we advised Harrows Promo-
14 tions, Elite Deli, that we had taken over Mr. Piazza's
15 Agency and we would service the account.

16 THE COURT: What date is this?

17 THE WITNESS: February 2, 1971.

18 THE COURT: Show it to Mr. Kaplan.

19 (Document shown to counsel)

20 Q You say this is the only other piece of corres-
21 pondence you have in the file relating to this policy?

22 A Yes.

23 Q Let me show you this, Mrs. Motola.

24 (Document shown to witness)

25 Q Can you tell me whose handwriting appears on

1
2 the bottom there?

3 THE COURT: What is it?

4 MR. KAPLAN: I am showing her papers
5 produced by this defendant pursuant to Rule
6 34 demands and it is under the back of a
7 Speyer and Greenhill --

8 MR. JANOW: Would you identify it
9 so I can look --

10 A I don't know whose handwriting that is.

11 THE COURT: Is it a letter by
12 Charles Benway?

13 MR. KAPLAN: It appears to be --

14 MR. JANOW: I will answer the
15 question --

16 MR. KAPLAN: Please, please.

17 THE COURT: I am interested. We
18 are not playing games here. I'd like
19 to know.

20 Q Let me ask you this, Mrs. Motola, were there
21 any claims on this policy for plateglass losses?

22 A I would have to look back.

23 Q Well please look.

24 THE COURT: It is irrelevant.

25 MR. KAPLAN: That is what the notation

1
2 refers to.

3 MR. JANOW: That notation has
4 nothing to do with this lady or her office
5 or anything at all.

6 THE COURT: We are not going to
7 take any sort of time with that sort of
8 thing.

9 Q Now, I'm going to show you this paper dated
10 December 1st, 1971 --

11 MR. JANOW: May I take a look at it
12 and see what you refer to?

13 (Document handed to counsel)

14 (pause)

15 MR. JANOW: If your Honor please
16 it is entirely irrelevant.

17 THE COURT: What is about?

18 MR. KAPLAN: I haven't had a chance
19 to ask her.

20 THE COURT: Ask her.

21 Q Do you have a copy of that letter in the file?

22 THE COURT: Is it from Charles Benway?

23 MR. KAPLAN: It is on Charles Benway's
24 letterhead, your Honor.

25 MR. JANOW: And may I speculate and

1
2 answer for the Court's enlightenment, if
3 I may?

4 THE COURT: You better ask Mr. Kaplan
5 if he wants your speculative answer.

6 MR. KAPLAN: I'd like to examine the
7 witness in a normal manner.

8 THE COURT: You don't have to make
9 speeches. You know, I would not allow this
10 in front of the jury. Let's do this in a
11 business way.

12 Of course, you'll examine the witness
13 in an ordinary way and all that nonsense --
14 of course. However, I am trying to find
15 out what this is about.

16 If it is plate glass windows covered
17 by the policy I am not interested --

18 MR. KAPLAN: It has nothing to do
19 with that, your Honor.

20 THE COURT: I am interested in
21 whether this policy was cancelled properly
22 and that's all.

23 A I would not have it with me.

24 Q You don't have that letter with you?

25 A No.

1
2 MR. KAPLAN: May I have this
3 deemed marked --

4 THE COURT: In the first place,
5 she doesn't know about it

6 MR. KAPLAN: I would like it
7 marked for identification.

8 You have it in the original court
9 papers and it is the fourth document --

10 THE COURT: Well, just hand it to
11 me.

12 (Document handed to Court)

13 (pause)

14 THE COURT: Well, it is from Benway --
15 well, it isn't. Well, it is not to Elite
16 Deli -- oh, yes. Oh, I see. It is after
17 the fire.

18 The letter was written by Mr. Murphy,
19 a lawyer; is that right?

20 We are wasting time. Show it --

21 MR. KAPLAN: I showed it to her
22 and she said she didn't know about it. I
23 got the papers from the defendant.

24 I ask your Honor to take notice --

25 THE COURT: I will have to take notice.

It is in the papers.

I read the papers in connection with your motion for summary judgment and all that is is a letter obviously written by an attorney and signed by DeFrancel demanding payment after the fire.

THE CLERK: Plaintiff's exhibit 2 for identification, letter of Charles Benway, Dated 12/1/71.

(So marked)

MR. KAPLAN: Nothing further.

MR. JANOW: Charles Benway.

CHARLES D. BENWAY, having first been duly sworn by the Clerk of the Court took the witness stand and testified as follows:

THE CLERK: State your name and spell it, please.

THE WITNESS: Charles D. Benway,

B-e-n-w-a-y.

DIRECT EXAMINATION

BY MR. JANOW:

Q Mr. Benway, what is your business?

A I am an independent insurance agent.

1
2 Q Where do you conduct your business?

3 A 220 Victory Boulevard, Staten Island, New York.

4 Q Approximately how long have you been in that
5 business?

6 A Sixteen years.

7 Q And you employ among other people, Miss Betsy
8 Motola?

9 A I do.

10 Q Did you know a man called Piazza?

11 A John L. Piazza.

12 Q What line of business was he in?

13 A He was an insurance agent.

14 Q And did you have any business relationship with
15 him on or about December 1st, 1970?

16 A I purchased his business.

17 Q He was in somewhat of a similar type of busi-
18 ness that you were in?

19 A Exactly.

20 Q When you purchased his business did you remove
21 any records or papers or policies from his office to your
22 office?

23 A Yes, his total insurance records were brought
24 to my office.

25 Q Among those papers and records --

1
2 THE COURT: You must speak up.

3 You are dropping your voice. Speak up
4 so Mr. Kaplan can hear you. I am having
5 difficulty.

6 MR. KAPLAN: I hear him.

7 Q Among such papers you received were any con-
8 cerned with Narrows Promotions Limited doing business as
9 Elite Deli?

10 A Yes.

11 Q Did you handle business for that firm?

12 A Yes.

13 Q Did you know who the principal was of that
14 firm?

15 A Not originally.

16 Q Up to December 1, 1970 had you ever met Mr.
17 Robert DeFrancel?

18 A Not to my knowledge.

19 Q When after December 1st, 1970 did you meet him?

20 A The time I met him face to face was, I would
21 say, would have been after the loss.

22 Q And the date -- October 24, 1971?

23 A The morning that he came to my office.

24 Q That was the first time?

25 A That was the first time.

1
2 THE COURT: What date is that?

3 MR. JANOW: October 24.

4 MR. KAPLAN: That's the date of
5 the fire.

6 THE WITNESS: The morning after,
7 on the 25.

8 Q It happened October 24, 8:00 or 8:30 -- that was
9 the fire and that was a Sunday --

10 THE COURT: Sunday, October 25, he
11 comes to see you at your office?

12 THE WITNESS: Yes, aftercalling me
13 on the phone.

14 Q Where did he call you first, in the office or
15 some other place?

16 A I think I was home in my pajamas.

17 THE COURT: He made an appointment
18 to see you at your office after first
19 calling your home?

20 THE WITNESS: Yes.

21 Q Tell me if you will, what business did you
22 handle for Mr. DeFrancel?

23 A For Mr. DeFrancel?

24 THE COURT: I think we have to know
25 what we are talking about.

1
2 Narrows Promotions doing business
3 as Elite Deli is what we are interested in.
4 We are not interested in the other busi-
5 ness -- with which we are not concerned.

6 MR. JANOW: It may come in collater-
7 ally as far as this case is concerned.

8 THE COURT: Very well.

9 Q You did carry a fire insurance policy on the
10 delicatessen at 2100 Richmond Road?

11 A Yes I did.

12 Q Do you know the policy number of that contract?

13 A Seventeen SMP 101960.

14 Q Did you get that policy when it was first
15 issued for that firm, meaning the Narrows Promotion firm?

16 A No I didn't. I got this from Mr. Piazza.

17 This policy became effective July 25, 1970. I
18 didn't purchase Mr. Piazza's business until October or rather
19 December 1st, 1970.

20 Q So that you took over this policy among other
21 things?

22 A It was already in force, yes.

23 Q And the term of that policy mentioned by you is
24 from July 25, 1970 to July 25, 1973?

25 A That is correct.

1
2 Now, when did you speak to him with respect
3 to a fire --

4 MR. JANOW: Withdrawn.

5 Q Did you, in your office, get a letter or a
6 copy of a cancellation notice pertaining to this policy?

7 A Yes we did.

8 Q Have you -- did you bring it with you to court?

9 A Yes, I brought it.

10 Q I show you defendant's exhibit M and ask you
11 whether you got that copy?

12 A Yes we did.

13 THE COURT: Let's see that.

14 (Document shown to Court)

15 (pause)

16 THE COURT: I don't see the date --
17 oh, this is 7/13.

18 You have got that?

19 THE WITNESS: We received that a
20 few days, I imagine, after 7/13.

21 THE COURT: You received that a
22 few days after 7/13. All right.

23 Q Was there any communication had between you,
24 your office and the firm of Narrows Promotions, Elite Deli?

25 A I guess have to testify to it again. All right.

1
2 I instructed Mrs. Motola or dictated a letter
3 to Mrs. Motola after she failed to reach him by phone --

4 Q When you refer to a letter I show you a copy
5 of a letter bearing date July 27, defendant's exhibit N and
6 ask you if that is the letter just referred to by you?

7 A Yes sir.

8 Q And do you know whether you personally mailed
9 this letter after she wrote it and addressed it, sealed it
10 and stamped it?

11 A I bring the mail to the main post office maybe
12 99 percent of the time. Once in a while no, but most of
13 the time, yes.

14 Q When you say "the mail" -- whatever correspon-
15 dence there is?

16 A The total mail leaving my office after five
17 o'clock is put into two rubber bands which are mail for on
18 Staten Island and off Staten Island mail because the post
19 office wants us to put it down that way.

20 THE COURT: How do you carry it,
21 in a satchel?

22 THE WITNESS: I take the two bundles
23 right in my hands, place them on my car seat,
24 drive there and bring it in.

25 Q You drive to where?

1
2 A Victory Boulevard and Manor Road post office.

3 Q Did you hear from Mr. -- from Narrows Promotions,
4 Elite Deli, after that letter was sent on July 27?

5 A Only after the loss.

6 Q And that -- you will fix a date, please.

7 A October 25, 1971.

8 Q You testified that you got a telephone call
9 from, whom?

10 A From Mr. DeFrancel.

11 Q And how many Messrs. DeFrancel did you ever come
12 across in connection with Narrows Promotions?

13 A He is the only one.

14 Q What is his full name?

15 A I know now it is Robert DeFrancel.

16 Q Had you ever before at that time or subsequent,
17 met anyone else named DeFrancel in this connection?

18 A In this connection, no.

19 Q Robert was the only one?

20 A Yes.

21 Q What did he say to you when he called -- in
22 substance?

23 MR. KAPLAN: Objection.

24 MR. JANOW: I will ask a leading
25 question.

1
2 Q He made a telephone call to you?

3 A Yes.

4 Q Did you tell him to meet you?

5 A Yes.

6 THE COURT: And you saw him at
7 your place. We know that.

8 Now then, go ahead.

9 Q Did he go up to your place?

10 THE COURT: October 25.

11 What time in the morning?

12 THE WITNESS: It could have been
13 nine o'clock. He was with another man.

14 THE COURT: With whom?

15 THE WITNESS: A fire adjuster.

16 THE COURT: You know him?

17 THE WITNESS: Steven something.

18 THE COURT: Does he work for
19 himself?

20 THE WITNESS: He is an independent
21 and they handle fire cases.

22 Q For who?

23 A Insureds to establish losses.

24 Q Did you talk with him?

25 A Yes.

1
2 Q What was the conversation between you?

3 A I pulled out my folder in which I had his
4 insurance.

5 Q Where was he?

6 A Standing alongside me.

7 Q Who was with you at the time you pulled out the
8 folder?

9 A Mr. DeFrancel and the other gentleman.

10 Q Do you know his name?

11 A Steven Horowitz, I think.

12 Q Can I prompt it to you? Was it Mr. Horowitz?

13 A I think so.

14 Q Mr. DeFrancel brought him along?

15 A He was there at the time; same time.

16 Q Did you expect him -- Mr. Horowitz?

17 A No.

18 Q What did you do in their presence?

19 A I pulled out the folder. The outside was
20 marked "cancelled" and the inside carried the usual papers.

21 I told him it was cancelled and I said "Take
22 a look at that" and he said "I never got that."

23 I said "We tried to call you twice and wrote
24 you a letter." He said he never got that either and he
25 followed me to my office and the other gentleman stayed

1
2 outside.

3 He said "Can we do anything?" I said "If we
4 can do something about this we will. If they don't have the
5 notice, the cancellation notice as it should be -- it is a
6 fair company -- they will open it up. If they have it, then
7 there is nothing we can do." He said "Mr. Piazza always took
8 care of me." I told him he had no insurance and someone
9 could get hurt and fall and that he had better do something
10 immediately and then I photostated the entire policy and
11 certain papers s o he could go elsewhere and get insurance.

12 Q You say you photostated certain papers.

13 I show you L and M. Are those the papers?

14 A Yes.

15 THE COURT: He said he didn't get the
16 letter either?

17 THE WITNESS: He said he didn't
18 receive it.

19 Q What did you do when you photostated these two
20 papers?

21 A I handed everything to him.

22 Q Something other than these two papers?

23 A I photostated the policy itself so he would
24 have the information to bring this elsewhere to get insur-
25 ance for whatever he needed.

1
2 It would have helped any insurance agent he
3 would have went to, write the insurance.

4 Q Did he ask you to write the insurance?

5 A No.

6 Q When next did you hear from him?

7 A Next, I think the time we heard from him was a
8 letter sent to us saying he is holding me, Charles Benway,
9 personally liable for any losses and so on and that was the
10 sum total of it all, I guess.

11 Q Mr. Benway, you handled other insurances for
12 Mr. DeFrancel, did you not -- or his firm?

13 A Harrows Promotions, yes.

14 Q Did you handle a workman's compensation policy
15 issued to his firm by the Hartford in or about November 17,
16 1970 which had a policy number of Seventeen WH314343? Will
17 you take a look --

18 A I have what you refer to here (indicating).

19 I didn't handle it but it was turned over to
20 me along with other folders belonging to Elite Deli. That
21 was terminated, that policy, November 17, 1970 for cancella-
22 tion of non-payment of premium.

23 MR. KAPLAN: Objection. It is
24 totally irrelevant.

25 MR. JANOW: It shows a pattern of

1
2 non-payment and cancellation.

3 THE COURT: No. I won't consider
4 it.

5 Q Did you handle any insurance in connection with
6 coverage for a beer permit so as to enable the firm to sell
7 beer?

8 A Yes.

9 Q Tell his Honor what your participation in that
10 aspect was.

11 MR. KAPLAN: I object.

12 THE COURT: If it is the same thing
13 I will take it. If it is another termina-
14 tion for lack of payment --

15 MR. JANOW: He paid it out of his
16 own pocket.

17 MR. KAPLAN: He could have termina-
18 ted 80 policies but the issue is whether
19 the policy in question was terminated.

20 THE COURT: It shows a pattern.
21 I will take it.

22 Q Tell his Honor about that transaction.

23 A My office was called to obtain a beer bond for
24 an additional location being opened for Narrows Promotions
25 Limited on Amboy Road.

1
2 Mr. Piazza had gotten his previous bond for the
3 Elite Deli from the Excise Bond Underwriters, 69 Fulton Street
4 New York, New York.

5 I went there to purchase the additional bond
6 and they told me they could not issue it --

7 MR. KAPLAN: Objection to what
8 they told him.

9 THE COURT: Was it terminated?

10 THE WITNESS: They cannot terminate
11 a bond but they said they wouldn't do it
12 until the previous years premiums were
13 paid.

14 THE COURT: I will take it for what
15 it is worth, Mr. Kaplan.

16 Q What did you do about that premium, meaning the
17 premium, on the insurance for the beer coverage?

18 A I paid it out of my pocket at that time so they
19 would issue the current bond. They are only \$7.50 a policy.

20 THE COURT: All right.

21 Next.

22 Q Did you write Mr. DeFrancel or the Narrows
23 Promotions about that piece of business?

24 MR. KAPLAN: Objection.

25 THE COURT: Did you write him a letter?

1
2 THE WITNESS: Yes.

3 THE COURT: Did he say he got
4 it?

5 THE WITNESS: I never asked whether
6 he received it or not but he paid it so he
7 did receive it.

8 Q Did you enclose a paper for him to sign with
9 that letter?

10 A Yes.

11 Q Did he sign it and return it to you?

12 A For the bond, yes.

13 THE COURT: When was that?

14 THE WITNESS: May 17, 1971.

15 Q I show you --

16 MR. JANOW: Withdrawn.

17 Q Have you got a letter that you wrote to Narrows
18 Promotions dated May 17, 1971?

19 A Yes.

20 Q Is that the letter you wrote him with regard to
21 the payment of the delinquent premiums on the beer insurance?

22 A As well as the new application which had to be
23 signed, yes.

24 MR. JANOW: I offer it in evidence.

25 MR. KAPLAN: Objection.

1
2 MR. JANOW: It goes to the credibility
3 of the man.

4 THE COURT: Is this the reply or
5 what?

6 MR. JANOW: This is the letter making
7 enclosures of certain applications.

8 THE COURT: I don't want the letter
9 unless I get the reply with it.

10 Q Did you get a reply?

11 A Not in writing. We got a check.

12 THE COURT: You got a check?

13 THE WITNESS: Yes.

14 THE COURT: Do you have a copy of
15 the check?

16 THE WITNESS: No. We just have
17 the posting on April 28, 1971.

18 THE COURT: He sent a check without
19 a letter?

20 THE WITNESS: Correct.

21 Q Did he send you a signed application or form?

22 THE COURT: Yes. Did he send you a
23 signed application after you sent the
24 letter?

25 THE WITNESS: Yes.

1
2 THE COURT: Where is that?

3 THE WITNESS: With the Excise Bond
4 Underwriters. That is a prerequisite as
5 to issuing a bond.

6 THE COURT: You don't have that?

7 THE WITNESS: No.

8 THE COURT: I will take the
9 letter.

10 THE CLERK: Defendant's exhibit O,
11 letter marked in evidence.

12 (So marked)

13 THE WITNESS: We have a copy of it.
14 We must have sent him two because it
15 is signed right through.

16 That is a copy and it shows his check
17 number.

18 Q You mean this is a copy of a form that was
19 enclosed with your letter addressed to Narrows Promotions
20 which was your letter dated May 17?

21 A No, no.

22 This is a prerequisite to be signed for the
23 bond -- before that letter -- which that letter sent the
24 bond with the bill and this was the application for that.

25 Q The application form?

1
2 A Yes -- signed.

3 THE COURT: And returned?

4 THE WITNESS: Yes.

5 MR. JANOW: I offer it in evidence.

6 MR. KAPLAN: Objection.

7 THE COURT: Same ruling.

8 THE CLERK: Defendant's exhibit P
9 marked in evidence.

10 (So marked)

11 Q You say you got a letter from Mr. DeFrancel or
12 Mr. DeFrancel's firm, the Narrows Promotions asserting some
13 kind of claim against you?

14 A Yes.

15 THE COURT: That was afterward?

16 THE WITNESS: Yes.

17 THE COURT: I am not interested in that.

18 MR. JANOW: I will discontinue at this
19 time.

20 That's all, Mr. Benway.

21 CROSS EXAMINATION

22 BY MR. KAPLAN:

23 Q Mr. Benway, you heard Mrs. Motola testify about
24 the mailing practice in the office?

25 A Yes.

1
2 Q She said you or she took the mail to the post
3 office; is that correct?

4 A That is correct.

5 Q Now, I take it you don't have any independent
6 recollection of who took the mail to the post office on a
7 particular day?

8 A No.

9 Q And you don't know how many pieces of mail some-
10 body took on a particular day, do you?

11 A On a particular day?

12 Q Yes.

13 A No. I would go along with her -- an average of
14 75 or 100.

15 Q And I take it that on the occasions that you
16 took the mail to the post office, whenever you did it, you
17 didn't go through the mail to see who the letters were addressed
18 to?

19 A No.

20 Q If you took the mail to the office yesterday
21 you couldn't tell me as far as yesterday, the names and
22 addresses?

23 A No.

24 Q You are not here pursuant to subpoena?

25 A No.

1
2 Q In fact, Mr. DeFrancel is suing you in
3 Richmond County over the same transaction?

4 A Absolutely.

5 Q Involving the same type of claim?

6 A No.

7 Q A claim over this policy?

8 A Yes.

9 Q Had you ever met Mr. DeFrancel before October
10 25, 1971?

11 A Not to my recollection.

12 Q Had you ever been to his place of business?

13 A I have been there five or a hundred times, to
14 tell the truth. I go to Buda Bakers and go next door to
15 buy milk but I wouldn't know who was Robert DeFrancel was
16 prior to the loss.

17 Q When he called you on October 25, 1971 I take
18 it you had no recollection of his business status with you
19 over the deli?

20 A I had some. I said I thought the policy was
21 cancelled.

22 THE COURT: You told him on the
23 phone right then and there?

24 THE WITNESS: The annual premium
25 runs like 25 hundred dollars. When you lose

1
2 it, it costs you money. I purchased
3 an agency with money. When you lose
4 a line you lose money.

5 THE COURT: Would he have paid
6 it to you?

7 THE WITNESS: Well, July 25, 1971
8 we billed him for it but it was never
9 paid.

10 THE COURT: When?

11 THE WITNESS: June 1st, '71.

12 THE COURT: Do you have copies of
13 the letter?

14 THE WITNESS: I have copies of the
15 bills showing that his second installment
16 was due and payable.

17 THE COURT: Did you ever receive
18 a check, phone calls or reply whatsoever?

19 THE WITNESS: None.

20 Q Did you ever personally talk to him about what
21 you claim you billed him for?

22 A No.

23 Q As far as you knew, Mr. Benway, July 13 1971
24 was the policy in force and effect?

25 A As far as my records.

1
2 Q And you had no reason to believe that anyone
3 cancelled the policy at that time?

4 A No.

5 Q You had no reason to believe that anyone had
6 cancelled the policy prior to that time?

7 A No.

8 MR. KAPLAN: Nothing further.

9 THE COURT: There is no question,
10 as I understand it, that the policy was
11 in default; that it was not paid.

12 There is no question about that
13 because if it was fully paid there is no
14 basis for cancellation and the dispute is
15 not on the question of whether or not
16 the policy --

17 MR. KAPLAN: I don't believe that
18 is accurate so I had better ask him some
19 more questions.

20 THE COURT: Are you claiming that
21 the policy was paid and there is no basis
22 for the cancellation notice?

23 MR. KAPLAN: No. This has nothing
24 to do with the non-payment of the second
25 premium but I am claiming --

1
2 THE COURT: I am talking about
3 the payment of the nine installments of
4 the first premium. Do you claim that was
5 paid?

6 MR. KAPLAN: All I am claiming is
7 what he testified to.

8 THE COURT: Well, he doesn't know,
9 as I understand it, whether it is paid
10 or not but on the other hand, Hartford
11 Insurance employees stated it was definitely
12 not paid and we have a note from the bank
13 that it was not paid and he says if he has
14 the check he paid for it and we are inter-
15 ested in seeing that check.

16 MR. KAPLAN: I have no such check and
17 I claim it has nothing to do with the law
18 suit.

19 THE COURT: Well, you could have a
20 defense that there is no justification for
21 notice of cancellation.

22 MR. KAPLAN: Let me ask him a couple
23 of more questions.

24 CROSS EXAMINATION

25 BY MR. KAPLAN CONTINUING:

1
2 Q Let me show you this and would you tell me
3 whose handwriting that is?

4 (Document shown to witness)

5 A Not mine.

6 MR. JAMOW: What is that?

7 MR. KAPLAN: Same thing, the plate
8 glass --

9 MR. JAMOW: Entirely irrelevant.

10 THE COURT: Of course.

11 Q How long have you been a broker?

12 A Since 1957.

13 Q You handle all this type of fire business?

14 A Yes.

15 Q What is a recall notice?

16 A It could have many meanings.

17 Q Tell us some of them.

18 For example, let me show you this paper --

19 MR. KAPLAN: Can I have that cancella-
20 tion notice?

21 (Document handed to counsel)

22 Q (continuing) I show you exhibit M.

23 You see the word "recall" on top of that?

24 A Yes.

25 Q Does that have any special meaning to you as an

1

2 insurance broker?

3 A It is not absolute.

4 Q Could it have several meanings?

5 A Yes.

6 Q What could it have?

7 A The meaning could have -- I know what it is in
8 this instance -- that maybe the man did not live up to certain
9 safety remedies the company asked him to and they want the
10 policy back.

11 It could be that he has had more losses than
12 the ordinary person in his class and they would want their
13 policy back.

14 From my understanding -- we checked -- we had
15 to call to find out the reason.

16 Q You didn't know what the reason for the recall
17 was?

18 MR. JANOW: He is speculating.

19 THE WITNESS: I found out the reason.

20 Q Isn't it true there are more reasons than non-
21 payment as to why the company could have cancelled the policy?

22 A Absolutely.

23 Q Recall is the same as cancellation in the lang-
24 uage you use?

25 A Yes.

1
2 THE COURT: We are wasting time.

3 A lot of things "could be."

4 You are an experienced lawyer.

5 Perhaps you are used to the state courts.

6 Let's get down to the issue here.

7 MR. KAPLAN: I just wanted to
8 establish --

9 THE COURT: Anything is possible.

10 It seems to me from the testimony
11 introduced here that it is very clear that
12 this man did not pay the installments due
13 on the policy. Now, we are playing games
14 if we are trying to indicate that maybe he
15 did.

16 MR. KAPLAN: Not at all.

17 THE COURT: Then if he didn't pay,
18 the notice of cancellation is for non-
19 payment, not too many losses or anything else.

20 MR. KAPLAN: I will ask him directly.

21 Q You say you called the company and asked the
22 reason for the recall notice. What did they tell you?

23 A A Mr. Jonathan Pon called us back and said he
24 received a termination notice from the New York Finance office
25 which he felt was not sufficient notice because it had a

1
2 mortgagee on a policy.

3 The cancellation that was originally sent was
4 only sent to the insured and not First National City Bank
5 and he felt to establish a correct cancellation he had to
6 re-do it and he did.

7 THE COURT: He said he didn't send
8 the first notice to First National City Bank?

9 THE WITNESS: The first notice in
10 May, from what I gather here -- because I
11 didn't receive that notice -- went from
12 123 William Street to Mr. DeFrancel. That
13 took care of that cancellation but left
14 the First National City Bank on so he did it
15 all over again to the Narrows Promotions and
16 the First National City Bank.

17 Q That is what he told you?

18 A Yes.

19 THE COURT: It looks like that is
20 what happened too.

21 MR. KAPLAN: That he intended to do
22 it, I have no doubt --

23 THE COURT: First notice, well --
24 but they got the second notice, though.

25 Who is the next witness?

1
2 MR. JANOW: That's all for the
3 defendant.

4 THE COURT: All right.

5 Thank you very much, Mr. Benway.

6 Where do we stand now?

7 MR. JANOW: The defendant rests
8 except that I respectfully reserve my
9 right to possibly call a witness in rebuttal.

10 THE COURT: Rebuttal of what?

11 MR. JANOW: If there is going to
12 be -- I don't know how the case is being
13 run.

14 If Mr. DeFrancel doesn't take the
15 stand I am absolutely through.

16 THE COURT: You go ahead, Mr.
17 Kaplan.

18 MR. KAPLAN: Nothing further.

19 THE COURT: Then you are through
20 and he is through and we are all through.

21 MR. JANOW: The defendant moves
22 for a dismissal of the cause of action
23 of the complaint on the grounds that the
24 plaintiff has failed to prove a cause of
25 action.

1
2 THE COURT: All right, Mr. Kaplan.

3 MR. KAPLAN: Shall I submit a
4 post trial memorandum?

5 THE COURT: No.

6 MR. KAPLAN: May I argue briefly?

7 THE COURT: Yes.

8 MR. KAPLAN: I would like to argue
9 briefly.

10 I have these cases --

11 THE COURT: Okay. Perfectly all
12 right. Oh, yes. Submit it in a couple
13 of days.

14 THE COURT: Do you have anything else
15 besides your cases?

16 THE KAPLAN: Just my three cases.
17 The fourth book didn't fit into my briefcase.

18 THE COURT: Very well. You can
19 have two days.

20 This is a very simple matter.

21 MR. KAPLAN: I think it is simple too.

22 THE COURT: Do you want to add
23 anything more?

24 MR. JANOW: No.

25 THE COURT: All right. We will give

1
2 you -- I will decide the case within two
3 or three days. I can't carry it with me.

4 MR. JANOW: Some of my exhibits were
5 marked for identification. Shall I
6 disregard that and consider them in
7 evidence?

8 THE COURT: If they haven't been --

9 THE CLERK: One, the notice of can-
10 cellation of 7/13.

11 THE COURT: All the notices of
12 cancellation were admitted into evidence.

13 THE CLERK: One was for identification.

14 THE COURT: Ask Mr. Kaplan about
15 that.

16 THE CLERK: One notice of cancellation
17 July 13, 1971 was marked for identification,
18 not evidence.

19 MR. KAPLAN: I don't care, Judge.
20 It is spread over the record so thoroughly --
21 E is the same as M.

22 THE COURT: I thought we took that
23 subject and then -- well, you first intro-
24 duced it while Mr. DeFrancel was on the stand
25 and then we had the testimony of the other

1
2 witnesses and they connected it up so it
3 is in evidence.

4 MR. JANOW: Thank you.

5 Does your Honor want findings of
6 fact in this case?

7 THE COURT: Proposed findings of fact,
8 proposed conclusions of law, if you can do
9 it in two or three days.

10 MR. KAPLAN: Your assistant assured
11 me he has read all the cases which I think
12 control this and I would like to avoid doing
13 unnecessary paper work or avoid having you
14 do unnecessary reading.

15 THE COURT: No use doing repetitive
16 work. I read some of the papers in connection
17 with the summary judgment.

18 You weren't here --

19 MR. JANOW: No.

20 THE COURT: Okay. By Monday or Tuesday
21 I will do something.

22
23 * * * * *

I N D E X

<u>WITNESS</u>	Direct	Cross
DeFRANCEL	18	55
ROSSI	56	65
MORAN	71	83
THOMPSON	89	101
VIERNO	102	123
BOYLE	129	134
MOTOLA	154	166
BENWAY	178	195

E X H I B I T S

<u>Plaintiff</u>	Description	Identification	Evidence
# 1	policy		17
# 2	letter	178	
<u>Defendant</u>			
A	Agreement		25
B	"		30
C	"		33
D	letter		41
E	notice	43	

I N D E X continued

<u>Defendant</u>	Description	Identification	Evidence
F	2 notices		64
G	envelope		74
H	manifold		90
I	document		109
J	forms		116
K	forms		116
L	certificate		121
M	notice		160
N	letter		166
O	letter		194
P	form		195

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----	x	
	:	
NARROWS PROMOTIONS, LTD., d/b/a	:	
ELITE DELI,	:	
	:	
Plaintiff,	:	Index Number
	:	72 Civ. 1523
-against-	:	
	:	
HARTFORD INSURANCE COMPANY,	:	
	:	
Defendant.	:	
-----	x	

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

1. Plaintiff was insured for fire under a policy, 17 SMP 101960, issued by defendant covering premises 2100 Richmond Road, Staten Island, New York.

2. The policy bore inception date July 25, 1970 and was to run for three years.

3. Plaintiff financed the first year's premium and defaulted in a payment due April 25, 1971.

4. Defendant sent a notice of default, dated May 17, 1971 to plaintiff by mail to policy address, which notice advised plaintiff that the policy would be cancelled.

5. Plaintiff failed to respond to said notice of May 17, 1971.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

6. Defendant sent notice of cancellation dated July 13, 1971, effective August 18, 1971 by mail to plaintiff at policy address.

7. Plaintiff failed to respond to the notice of cancellation dated July 13, 1971.

8. Defendant made attempts to reach plaintiff by telephone to inform plaintiff of the cancellation but plaintiff did not respond.

9. Defendant made additional attempts to reach plaintiff by letters but plaintiff did not respond.

10. None of the notices or letters mailed to plaintiff was returned.

11. Plaintiff has denied receipt of any of the aforesaid correspondence and mailings by defendant and by Charles Benway.

12. Plaintiff has not adduced any affirmative evidence in explanation of its alleged failure to receive any of the said correspondence and mailings.

13. A fire ensued on premises 2100 Richmond Road, Staten Island, N.Y. on October 24, 1971.

14. Plaintiff reported the fire of October 24, 1971 on the morning of October 25, 1971 to Charles Benway, broker, orally.

15. On or about December 1, 1970 Charles Benway purchased the brokerage business of John Piazza.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

16. John Piazza had obtained the issuance of policy 17 SMP 101960 prior to July 25, 1970 and Piazza's file pertaining to that policy was included in the papers turned over to Charles Benway as successor to Piazza's business.

17. When plaintiff, by Robert DeFranco, reported to Charles Benway on October 25, 1971 that a fire had occurred on October 24, 1971 it was the first time that those two individuals had met each other in person.

18. When Robert DeFranco reported to Charles Benway on October 25, 1971 that a fire had occurred on October 24, 1971 Benway promptly informed DeFranco that the plaintiff was not insured and that the policy had been cancelled.

CONCLUSIONS OF LAW

A. The various mailings, including notice of cancellation dated July 13, 1971, addressed to plaintiff, Narrows Promotions Ltd., Elite Deli, 2100 Richmond Road, Staten Island, New York, all of which were deposited in the mail in the regular course of business (none of which mailings were returned to the sender) - give rise to the presumption that all were received by the addressee.

B. The mere denial of receipt of mailings without any further, explanatory evidence is insufficient

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

to rebut the presumption of receipt of such mailings.

C. Plaintiff's denials of receipt of all the mailings in evidence are incredible as a matter of law.

D. The policy 17 SMP 101960 was duly cancelled prior to October 24, 1971 in accordance with its terms.

E. The fire of October 24, 1971 occurred after due cancellation of the said policy and was not covered by the policy.

F. The complaint should be dismissed.

Respectfully submitted,

GREENHILL & SPEYER
Attorneys for Defendant

By: /s/ JOHN M. SPEYER
A member of the firm

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DECISION OF THE COURT BELOW

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NARROWS PROMOTIONS, LTD.,
d/b/a ELITE DELI,

Plaintiff,

- against -

HARTFORD INSURANCE COMPANY,

Defendant.

Appearances:

EDMUND J. MURPHY, Esq.
Attorney for Plaintiff
93 New Dorp Lane
Staten Island, New York 10306
MARSHALL G. KAPLAN, Esq.
Of Counsel
50 Court Street
Brooklyn, New York 11201

GREENHILL and SPEYER, Esqs.
Attorneys for Defendant
56 Pine Street
New York, New York 10005
GEORGE JANOW, Esq.
Of Counsel

BARTELS, D. J.

On October 24, 1971, a fire occurred on plaintiff's premises at 2100 Richmond Road, Staten Island, New York. Plaintiff, Narrows

DECISION OF THE COURT BELOW

Promotions, Ltd. was doing business as the Elite Deli on the premises which were insured by the Hartford Insurance Company against fire in the amount of \$96,000. This action for the face amount of the fire insurance policy was originally instituted in the New York State Supreme Court but was removed to this Court by the defendant-insurance company pursuant to 28 U.S.C. Section 1332. Defendant denies liability upon the policy on the ground that it was cancelled for default in payment of premium by a mailed written notice as required by the policy, prior to the date of the fire. Plaintiff denies it received such notice and accordingly a full evidentiary hearing was had without a jury, with respect to which issue the Court found that the policy was properly and duly cancelled before the fire in accordance with the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Narrows Promotions, Ltd., doing business as Elite Deli, is a New York corporation with its principal place of business at 2100 Richmond Road, Staten Island, New York.
2. Defendant, Hartford Insurance Company, is a Connecticut corporation duly licensed by the Superintendent of Insurance of the State of New York to write fire as well as other types of insurance.
3. Defendant issued its policy of insurance, number 17 SMP 101960, insuring plaintiff's premises against the peril of fire,

DECISION OF THE COURT BELOW

among other perils, for a period of three years, effective July 25, 1970, in the principal amount of \$96,000, for a three-year premium of \$8,307.00, payable \$2,769.00 at inception and \$2,769.00 at each anniversary thereafter.

4. Plaintiff arranged for the payment of the first year premium of \$2,769.00 through a so-called Premium Finance Note and Agreement with the defendant, whereby plaintiff paid a cash down payment of \$553.80 and financed the remainder of \$2,215.20 together with the finance charge of \$73.86, aggregating a total of \$2,289.06, which it agreed to pay in nine monthly installments of \$254.34. Thereupon this note was discounted with the Chemical Bank. The note provided on the back thereof that in case of default in payment of any monthly installment, the unpaid balance of the indebtedness would become immediately due and payable without notice, and that such default would result in the cancellation of said policy.

5. The fire insurance policy permitted the defendant to cancel the policy at any time "by giving the insured a ten days' written notice of cancellation," apparently without cause.

6. Plaintiff is charged with notice that the ninth and final premium installment of \$254.34 was due on April 25, 1971.

7. Plaintiff defaulted on the final premium payment due April 25, 1971.

DECISION OF THE COURT BELOW

8. Plaintiff never made any effort at any time to make such payment, or to inquire as to its default.

9. Defendant was notified by plaintiff's default in payment of the ninth monthly premium installment of \$254.34 by two notices mailed to the defendant by the Chemical Bank which was financing plaintiff's installment payments, one of which was received by defendant on May 12, 1971, and one of which was received by defendant on June 7, 1971.

Notice from Defendant's Office at
123 William Street, New York, N.Y.

10. Upon receiving the Chemical Bank's first notice of default, Anna Rossi, supervisor of the defendant's Premium Finance Department located at 123 William Street, New York, N. Y., gave her subordinate, Theresa Moran, plaintiff's file and instructed her to send a written Acknowledgment of Cancellation to the plaintiff, which states: "We have no alternative but to acknowledge your cancellation of each such policy as of June 1, 1971."

11. The Acknowledgment of Cancellation was sufficient to give the recipient notice of the cancellation of his insurance policy.

12. Accordingly, about May 17, 1971, Theresa Moran completed a written Acknowledgment of Cancellation form directed to the plaintiff using plaintiff's name and address as she found plaintiff's name and address on the office copy of plaintiff's Premium Finance Note and Agreement which

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were plaintiff's correct name and address.

13. The Acknowledgment of Cancellation form consists of four pages divided by carbon paper. The first page is sent to the insured, the second to the producer (insurance broker), and the others are retained by the defendant.

14. Theresa Moran inserted the original Acknowledgment of Cancellation, dated May 17, 1971, into a righthand window envelope with the address as typed on the original thereby providing the address for the envelope. (D. Ex.G).

15. As indicated by the Company Copy of the Acknowledgment of Cancellation directed to plaintiff, the name and address typed on the form were plaintiff's correct name and address, and the Acknowledgment of Cancellation stated that plaintiff's insurance policy would be cancelled as of June 1, 1971. (D.Ex.B).

16. After inserting the Acknowledgment of Cancellation into the window envelope, Theresa Moran typed the name and address of the insured plaintiff on a postal manifest containing the names and addresses of other parties to whom the Premium Finance Department sent mail on May 17, 1971. (D.Ex.H).

17. Plaintiff's name and address as they appear on the Premium Finance Department's postal manifest are correct.

18. Either Theresa Moran or Anna Rossi delivered the mail listed on the postal manifest and the postal manifest itself to a

DECISION OF THE COURT BELOW

to a mailboy on May 17, 1971.

19. On the same day the mailboy carried the mail and postal manifest to the eleventh floor mailroom of the 123 William Street office where he counted the envelopes, compared the same with the number of names and addresses on the postal manifest and found that the number of envelopes was the same as the number of names and addresses on the postal manifest, and he thereupon inserted in the box on the postal manifest provided for the purpose the number of such pieces of mail and the number of such names and addresses, which in each case was 17.

20. Thereafter on May 17, 1971 the mailboy placed postage on each envelope and also placed five cents worth of postage on the manifest for each name and address appearing thereon.

21. On the same day the mailboy wrapped the envelopes in the postal manifest and delivered them to the postal clerk at the Church Street Station Post Office, New York, N.Y. in a valise.

22. The postal clerk, in the presence of the mailboy, thereupon counted the number of envelopes delivered to him, wrote this number, which was 17, in another box at the lower left hand corner of the postal manifest provided for that purpose, and then initialed and stamped the postal manifest with a stamp dated May 17, 1971.

23. Thereafter, the mailboy returned the postal manifest so marked and initialed to the Premium Finance Department of the defendant

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at 123 William Street, New York, N. Y.

Notice from Defendant's Office at
175 Remsen Street, Brooklyn, N.Y.

24. On July 12 or 13, 1971, Jonathan Pons, one of the underwriters for the defendant, sent to the defendant's Policy Writing Department a so-called Cancellation Worksheet which ordered that "Direct Notice of Cancellation" be sent with respect to plaintiff's insurance policy No. 17 SMP 101960. (D.Ex.I).

25. On July 13, 1971 the Cancellation Worksheet along with a copy of plaintiff's fire insurance policy and a Notice of Cancellation form (D.Ex.J) were delivered by an employee of defendant to Rose Vierno, supervisor of the Policy Writing Department located at 175 Remsen Street, Brooklyn, New York.

26. On the same day Rose Vierno matched up the policy number on the worksheet with the number on plaintiff's fire insurance policy and then delivered the Cancellation Worksheet, the insurance policy and the Notice of Cancellation form to a typist.

27. The Notice of Cancellation form consists of a mortgagee's copy, an insured's copy, a company copy, a producer's copy, a file copy and two certificates of mailing. Each page is separated by carbon paper.

28. After the Notice of Cancellation form was completed by the typist, it was delivered to an assembler who checked to make sure

DECISION OF THE COURT BELOW

it was correctly completed and then placed the insure's copy into a window envelope.

29. A Certificate of Mailing was attached to the envelope.

30. The Notice of Cancellation dated July 13, 1971, which stated that plaintiff's insurance policy would be cancelled as of August 20, 1971, was correctly addressed to plaintiff. (D. Ex.F).

31. The Certificate of Mailing attached to the Notice of Cancellation addresssed to the plaintiff contained plaintiff's correct name and address (D.Ex.L).

32. A mailboy collected all the Notices of Cancellation with attached Certificates of Mailing completed by the Policy Writing Department on July 13, 1971 and brought them to the mailroom where each Certificate of Mailing was matched up with its corresponding envelope.

33. Each envelope was passed through a postage metering machine and then each Certificate of Mailing was passed through a postage metering machine so that at the end of the process the mailboy had one pile of envelopes and one pile of Certificates of Mailing with each pile in the same sequence.

34. The Certificates of Mailing and corresponding envelopes were taken to the Cadman Plaza Post Office in Brooklyn, New York and delivered to a postal clerk on July 14, 1971.

35. The postal clerk at the Post Office checked the postage of each envelope and Certificate of Mailing, after which he stamped the

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Certificates of Mailing with a stamp dated July 14, 1971 and accepted the envelope.

36. The Certificates of Mailing stamped by the Post Office clerk were then returned to the Policy Writing Department.

37. The preparation of the forms, envelopes, certificates of mailing, postal manifests, postage metering and delivery to the Post Office of the envelopes and certificates were done in the regular course of business of the defendant and it was the regular course of business of defendant to take such action.

38. Each step was taken in the regular course of business at both the defendant's 123 William Street office and 175 Remsen Street office from the preparation of Acknowledgments and Notices of Cancellation to the deposit of the same in a United States Post Office and was described by the employee in charge of said step who testified to the procedure followed by himself and his subordinates as being done in the regular course of business and that it was the regular course of business to follow such procedures. No link in the chain leading from the preparation of the forms to their delivery at a post office was ignored or neglected.

Notice from the Benway Agency

39. The instant insurance policy was purchased by plaintiff through John L. Piazza Insurance Agency, which agency was purchased late

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in 1970 by Charles D. Benway Insurance Agency, which thereafter serviced plaintiff's insurance policy.

40. Plaintiff's principal and controlling stockholder is Robert DeFranco.

41. The Charles D. Benway Agency received a Notice of Cancellation of plaintiff's fire insurance policy from defendant on or about July 14 or 15, 1971 (D.Ex.M).

42. Betsy Motola, an employee of the Benway agency, typed a letter dictated to her by Charles Benway informing plaintiff that its fire insurance policy had been cancelled.

43. The letter was addressed to "Mr. Joseph DeFranco, Elite Deli, 2100 Richmond Road, Staten Island, New York, 10306" and was dated July 27, 1971 (D.Ex.N).

44. Betsy Motola enclosed with the letter a copy of the Notice of Cancellation sent to Charles Benway by defendant.

45. In accordance with the regular and ordinary course of business the letter was deposited in the place for outgoing office mail and was picked up in accordance with the regular and ordinary course of business by Charles Benway on or about July 27, 1971, who thereupon delivered the letter to the Manor Road Post Office, Staten Island, N.Y.

46. None of the correspondence, including the Notice of Cancellation, directed to the plaintiff by the defendant or the Charles D.

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Benway Agency was ever returned to the sender by the Postal Service.

47. On October 24, 1971, a fire occurred at plaintiff's premises, causing a total loss.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of the action pursuant to 28 U.S.C. Section 1332.

2. Plaintiff defaulted on the April 25, 1971 installment payment due on its fire insurance policy and remained in default on October 24, 1971, the date the fire destroyed Elite Deli.

3. An Acknowledgement of Cancellation of the policy, which is equivalent to a Notice of Cancellation, was properly mailed to plaintiff by the defendant on or about May 17, 1971.

4. A Notice of Cancellation of the policy was properly mailed to plaintiff by the defendant on or about July 14, 1971.

5. A copy of the Notice of Cancellation dated July 13, 1971 and sent to the plaintiff by the defendant was mailed to the plaintiff on or about July 27, 1971 by Charles Benway along with a covering letter stating that the plaintiff's fire insurance policy had been cancelled.

6. The proper preparation of forms, envelopes, Cancellation Notices, Acknowledgments of Cancellation, certificates of mailing, postal manifests as well as the proper addressing, postal metering and subsequent delivery of the same to a postal clerk in a Post Office may

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be established by testimony of all those participating in such action that such action was taken in the regular course of business and that it was the regular course of business to take such action. United States ex rel. Helmecke v. Rice, 281 Fed. 326, 331 (S.D.Tex. 1922); William Gardam & Son v. Batterson, 198 N.Y. 175, 91 N.E. 371 (1910); Aetna Insurance Co. v. Millard, 25 A.D. 2d 341, 343, 269 N.Y.S. 2d 588, 590 (3d Dept. 1966); Haak v. Brost Motors, Inc., 69 Misc. 2d 820, 331 N.Y.S. 2d 329 (Sup. Ct. Erie County 1970); Lerner v. Travelers Insurance Co. 27 Misc. 2d 815, 819-21, 212 N.Y.S. 2d 770, 775-76 (Sup. Ct. N.Y. County 1971); Allstate Insurance Co. v. Altman, 21 Misc. 2d 162, 168, 191 N.Y.S. 2d 270, 277 (Sup. Ct. Queens County 1959). See Boyce v. National Commercial Bank & Trust Co., 41 Misc. 2d 1071, 1075, 247 N.Y.S. 2d 521, 525 (Sup. Ct. Albany County), aff'd, 22 A.D. 2d 848, 254 N.Y.S. 2d 127 (3d Dept. 1964) (per curiam); Teichberg v. D.H. Blair & Co., 63 Misc. 2d 1073, 314 N.Y.S. 2d 284 (Sup. Ct. N.Y. County 1970). But see Caprino v. Nationwide Mutual Insurance Co., 34 A.D. 2d 522, 308 N.Y.S. 2d 624 (1st Dept. 1970). See also Capri v. Lumbermen's Mutual Casualty Co., ___ A.D. 2d ___, 352 N.Y.S. 2d 58 (3d Dept. 1974) (Mem.) which is inapposite to the facts in the instant case.

7. Letters which are properly addressed, stamped and mailed are presumed to have been delivered to and received by the addressee. Dulberg v. Equitable Life Assurance Society, 277 N.Y. 17, 21, 12 N.E. 2d 554, 555 (1938); Trusts & Guarantee Co. v. Barnhardt, 270 N.Y. 350, 352, 1 N.E. 2d 459, 460 (1936); New Syndicate Co., Inc. v. Gatti Paper Stock Corp., 256 N.Y. 211,

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214, 176 N.E. 169, 170 (1931); Hastings v. Brooklyn Life Insurance Co.,
138 N.Y. 473, 34 N.E. 289 (1893); Aetna Insurance Co. v. Millard, supra;
Boyce v. National Commercial Bank & Trust Co., supra.

8. The presumption of the receipt by plaintiff of the Notices
of Cancellation of the defendant's insurance policy was never rebutted.

9. Plaintiff's fire insurance policy was properly and legally
cancelled prior to October 24, 1971, the date of the fire which destroyed
the premises occupied by plaintiff doing business as Elite Deli.

10. Defendant is not liable to the plaintiff under its fire
insurance policy.

11. Judgment should be and hereby is granted in favor of the
defendant dismissing the complaint on the merits.

SO ORDERED.

Dated: Brooklyn, New York
April 24, 1974.

/s/ John R. Bartels
United States District Judge.

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

NARROWS PROMOTIONS, LTD.,
d/b/a ELITE DELI,

Plaintiff,

JUDGMENT

-against-

72 C 1523

HARTFORD INSURANCE COMPANY,

Defendant.

-----X

This action came on for a hearing before the Court, the Honorable John R. Bartels, United States District Judge, presiding, and the issues having been duly heard by the Court without a jury and a decision having been duly rendered with Findings of Fact and Conclusions of Law, is is

ORDERED and ADJUDGED that the defendant is not liable to the plaintiff under its insurance policy and plaintiff take nothing and the complaint is dismissed on the merits.

Dated: Brooklyn, New York
April 25, 1974

/s/ LEWIS ORGEL

Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
:
NARROWS PROMOTIONS, LTD., : File Number 72C-1523
:
Plaintiff : NOTICE OF APPEAL
:
-against- :
:
HARTFORD INSURANCE COMPANY, :
:
Defendant :
:
-----x

NOTICE IS HEREBY GIVEN that Narrows
Promotions, Ltd., plaintiff above named, hereby appeals
to the United States Court of Appeals for the Second
Circuit from the final judgment entered in this action
on the 24th day of April, 1974.

/s/ JOHN L. PIAZZA

JOHN L. PIAZZA
Suite 6101
Empire State Building
350 Fifth Avenue
New York, New York 10001
244-0650
Attorney for Plaintiff
Pro hac vice

AFFIDAVIT OF SERVICE

State of New York)
City of New York : ss.:
County of New York)

A. JUNE VICKERS, being duly sworn, according to law,
deposes and says:

1. That deponent is not a party to the action, is
over 18 years of age, and resides in the city, county and state
of New York.

2. That on the 27th day of August, 1974, deponent
served the within joint appendix upon Messrs. Greenhill & Speyer,
attorneys for the defendant-appellee in this action, at 56 Pine
Street, New York, New York 10005, the address designated by said
attorneys for that purpose by depositing a true copy of same
enclosed in a post-paid properly addressed wrapper, in an official
depository under the exclusive care and custody of the United
States Postal Service within the city, county, and state of New
York.

A. June Vickers
A. JUNE VICKERS

Sworn to before me this

27th day of August, 1974

George J. DeVaney
George J. DeVANNEY
Notary Public, State of New York
No. 31-7003135
Qualified in New York County
Commission Expires March 30, 1976

